FILE COPY

FILED
FEB 20 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

## No. 716

R. E. PECKHAM, Assignee and Trustee,
*Petitioner,*

*vs.*

JOSE E. CASALDUC, Trustee of Ronrico Corporation in Reorganization,
RONRICO CORPORATION, Debtor,
FERD S. MEYER, Individually and as Trustee; and
PUERTO RICO DISTILLING COMPANY,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.**

**(Opinions below are Appended Hereto)**

JAY E. DARLINGTON,
306 Hammond Building,
Hammond, Indiana,
Attorney for Petitioner.

## TABLE OF CONTENTS OF PETITION.


| | PAGE |
|---|---|
| Opinions below | 2 |
| Grounds for invoking this Court's jurisdiction | 2 |
| Questions presented for review | 2 |
| Statement of the case | 3 |
| Argument—Grounds for issuance of writ | 9 |
| Summary | 9 |
| Elaboration | 12 |
| Conclusion | 24 |


## APPENDIX OF THIS PETITION.


| | |
|---|---|
| District Court's opinion | 1a |
| Court of Appeals' opinion | 14a |


### TABLE OF CASES.


Albin v. Corning, etc. Co. (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171 ..... 19

Boykin v. Huff (C.A. D.C. 1941) 121 F.2d 865, 872 ..... 23

Chessman v. Teets (1955) 350 U.S. 3, 76 S.Ct. 34 ..... 24

Davis v. F. W. Woolworth Co. (10 Cir. 1931) 54 F.2d 366 ..... 21

Dept. of Public Works v. Rockwell Cemetery Assn. (1924) 312 Ill. 232, 143 N.E. 875, 877 ..... 21

Horowitz v. Kaplan (1 Cir. 1951) 193 F.2d 64 ..... 19

In re: Witherbee Court Corpn. (2 Cir. 1937) 88 F.2d 251, 254 ..... 20

John Hancock Mut. Life Ins. Co. v. Casey (1 Cir. 1944) 141 F.2d 104, 107 ..... 23

Peckham v. Casalduc, Trustee (C.A. 1, 1958) 261 F.2d 120 ..... 2

PAGE

Peckham v. Ronrico Corpn. et al. (C.A. 1, 1948) 171 F.2d 653, 658 ..... 3

Peckham v. Ronrico Corpn. et al., (C.A. 1, 1954) 211 F.2d 727, 728-730 ..... 3

Securities & Exchange Comm. v. U. S. Realty & Improvement Co. (1940) 310 U.S. 434, 457-8, 60 S.Ct. 1044, 1954 ..... 22

Tennessee Pub. Co. v. American Nat. Bank (1936) 299 U.S. 22-23; 57 S.Ct. 85, 87 ..... 22

STATUTES.

11 U.S.C. 47 ..... 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

---

**No.**

---

R. E. PECKHAM, Assignee and Trustee,

*Petitioner,*

*vs.*

JOSE E. CASALDUC, Trustee of Ronrico Corporation in Reorganization,
RONRICO CORPORATION, Debtor,
FERD S. MEYER, Individually and as Trustee; and
PUERTO RICO DISTILLING COMPANY,

*Respondents.*

---

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Court of Appeals**
**for the First Circuit.**

**(Opinions below are Appended Hereto)**

---

*To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:*

The above named Petitioner respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals, to require the latter to *entertain and review his appeal on the merits,* from the United States District Court for Puerto Rico, and shows:

## Opinions Below.

The opinion of the United States District Court for Puerto Rico, as yet unreported, is set forth in the appendix of this Petition at pages 1a to 13a.

The opinion of the Court of Appeals, set forth in the appendix of this Petition at pages 14a to 16a, is reported in:

*Peckham* v. *Casalduc, Trustee of Ronrico Corpn., et al.*, (C.A. 1, 1958) 261 F. 2d 120.

## Grounds for Invoking this Court's Jurisdiction.

The Court of Appeals rendered its opinion and judgment dismissing Petitioner's appeal to it, on November 21, 1958. (Appendix of this Petition, p. 14a).

This petition, filed 90 days thereafter, invokes this Court's general jurisdiction to review final judgments of the Courts of Appeals under 28 U.S.C. 1254 (1).

## Question Presented for Review.

Not the merits of the appeal, but Petitioner's *right to appeal*, is the question here presented.

Petitioner appealed from the District Court's order approving and confirming an amended plan of reorganization of Ronrico Corporation under Chapter X. The Court of Appeals, on motion of appellee-respondent Puerto Rico Distilling Company, dismissed the appeal on the grounds that:

(1) Petitioner "does not have the right to be heard" in this reorganization proceeding because he does not occupy the status of a creditor of, or stockholder of, the debtor.

(2) Petitioner "never became a party" in the reorganization proceeding, because he allegedly failed to file a petition for leave to intervene.

## Statement of the Case.

In addition to the opinions appended to this Petition, there is filed herewith the "Appellees' Record Appendix" as printed in the Court of Appeals.

*Previous Creditor's Suit and Appeals by Respondent.*

Before the present Chapter X proceeding was commenced, this Petitioner as plaintiff filed a judgment creditor's suit in the same District Court, *asserting an equitable lien* upon half of the *capital* stock of the debtor Ronrico Corporation which was allegedly held by respondent Meyer as trustee. The District Court rendered summary judgment against the plaintiff, from which he appealed, resulting in reversal with directions to the District Court to entertain and try the case:

> *Peckham* v. *Ronrico Corpn. et al.* (C.A. 1, 1948) 171 F. 2d 653, 658.

Thereafter, this Petitioner, as trustee holder of a different judgment, sought to intervene the latter judgment in said creditor's suit as an asserted *additional equitable lien* upon the same half of the capital stock of Ronrico Corporation. Upon being denied leave to intervene, he again appealed, resulting in reversal with directions to the District Court to permit the intervention as a matter of *right*:

> *Peckham* v. *Ronrico Corporation* (C.A. 1, 1954) 211 F. 2d 727, 728-730.

The latter opinion states:

> "It seems to us clearly to follow from these considerations that Peckham, both as plaintiff and as petitioner for intervention, is seeking to enforce

an *equitable lien* upon or *claim* to those *shares*." (Our italics). 211 F. 2d at page 730, bottom of 2nd column.

Following the latter reversal, the creditor's suit was tried, but *has not yet been decided by the District Court*. The trial and impending decision has lasted since February 1955 due to prolonged recesses.

*This Chapter X Proceeding.*

On April 6, 1956, while said trial of said creditor's suit of the Petitioner was in recess, said Ronrico Corporation filed a voluntary petition for reorganization under Chapter X.

"Appellees' Record Appendix" p. A1.

On January 23, 1958, while said trial of the trial recess creditor's suit was still in progress, the Trustee in the reorganization proceeding filed an Amended Plan of reorganization, which provided that all of said Meyer part of the debtor's capital stock, which was subject to the pending "equitable lien or claim" of this Plaintiff-Petitioner would be *sold* for a total of $244,000, *free and clear of all liens and claims*, against the stock, including Petitioner's, to said Puerto Rico Distilling Company, which was the only other stockholder of the debtor (and which later became the appellee which successfully moved in the Court of Appeals to dismiss the appeal in question). The Amended Plan included other peculiar provisions, such as placing Puerto Rico Distilling Company in a position to control the execution of the plan, having that concern pay the fees and costs of administration, etc.

"Appellees' Record Appendix" pp. 47, 49.

This Petitioner on February 23, 1958 filed written Objections to the Amended Plan, charging that the plan was *a perversion of the Chapter X* judicial machinery for the purpose of accomplishing a *violation of the Anti-Trust laws* of the United States and also of Puerto Rico, and a *violation of the Internal Revenue laws* of the United States; and that the plan was the result of *collusion* between the Meyer and Puerto Rico Distilling Company stockholders to avoid Petitioner's asserted liens and to accomplish the aforesaid unlawful objects.

"Appellees' Record Appendix" pp. A19 to A73.

The District Judge (not Referee or Special Master) on March 21, 1958 entered an order overruling Petitioner's said Objections *on the merits.*

"Appellees' Record Appendix" pp. A74 to A76.

This was followed on April 8, 1958 by the District Judge's order and opinion approving the Amended Plan. A large part of the opinion is devoted to a *decision of the merits* of Petitioner's said Objections.

"Appellees' Record Appendix" pp. A77 to A90.

Appendix of this Petition, p. 1a and particularly pp. 4a to 11a.

An order confirming the Amended Plan followed and this Petitioner appealed to the Court of Appeals from both the said approving and confirming orders. The two companion appeals raising identical questions were consolidated in the Court of Appeals.

Appendix of this Petition, p. 14a.

*Motion of Puerto Rico Distilling Company to Dismiss Appeal.*

The appeal was docketed in July 1958 and Petitioner was granted extensions of time for filing his Appellant's Brief. During this extended time, before his Brief was filed, appellee-respondent Puerto Rico Distilling Company (see above) filed its Motion to Dismiss the appeal, which, omitting formal parts, reads:

> "One R. E. Peckham (hereinafter called "Peckham) has purported to appeal from certain orders entered, and alleged to have been entered, by the United States District Court for the District of Puerto Rico in a proceeding entitled: "In the Matter of Ronrico Corporation, Debtor," Bankruptcy No. 2146.
>
> One of the orders, appealed from in No. 5389, was entered by the lower court on April 8, 1958, under the provisions of section 174 of the Bankruptcy Act, approving an Amended Plan of Reorganization of the debtor corporation for submission to creditors and stockholders.
>
> "The appeals in No. 5390 are stated by appellant to be 'from the District Court's orders entered herein on June 13, 1958, and each of them, including specifically the Order granting the Trustee's petition for classification of creditors, the Order granting Puerto Rico Distilling Company's petition to amend the Amended Plan, and the Order confirming said Plan as thus amended.
>
> "Peckham, the appellant, is neither a creditor nor a stockholder of the debtor Ronrico Corporation, but asserts his interest in the proceeding in the lower court as the plaintiff and intervenor in another proceeding now pending in the lower court under the title of "R. E. Peckham, Assignee for the Creditors of The Meyer-Kiser Bank, succeeding Thomas E.

Garvin, Receiver of the Meyer-Kiser Bank, Plaintiff vs. Ronrico Corporation et al., Defendants; R. E. Peckham, Trustee holder of Judgment assigned from liquidator of The Meyer-Kiser Bank of Miami, Interpenor vs. Ronrico Corporation et al., Defendants," Civil No. 4639 (hereinafter called the "Peckham Case"). This last-mentioned litigation has been twice before this court on purely procedural matters. The opinions of this court appear at 171 F. 2d 653, and 211 F. 2d 727.

"The moving party, Puerto Rico Distilling Company, is the principal creditor and principal stockholder of the debtor corporation.

"The grounds upon which Puerto Rico Distilling Company seek to dismiss the appeal in No. 5389 and the purported appeals in No. 5390 are as follows:

1. Appellant has no appealable interest in any order from which he purports to appeal.

2. Each of the appeals is a mere collateral attack upon prior orders of the lower court from which appellant was entitled to appeal, and which are now final and unappealable.

3. Appellant failed to become a party to the proceedings in the lower court, and has in consequence no right to appeal from any order entered by the lower court.

4. An order approving a plan of reorganization under section 174 of the Act is not an appealable order.

5. The appeals taken in No. 5390 were prematurely taken, and the appellate court is without jurisdiction to hear same.

As is permitted by Rule 26, a memorandum in support hereof accompanies this motion." (Our italics).

See certified original Record from Court of Appeals.

Petitioner filed answer to the above Motion, making substantially the contentions against dismissal hereinafter argued.

## ARGUMENT—GROUNDS FOR ISSUANCE OF WRIT.

### Summary.

### I.

**It clearly appears on the face of the District Court's opinion that the District Court did entertain this Petitioner's objections to the Amended Plan and did decide the merits of said objections against him.**

That order and opinion of the District Court operates as *res adjudicata* against him upon the issue made by his objections.

The other parties to the proceeding, Appellees-Respondents, *took the benefit* of that adjudication, and *took no cross-appeal* contesting the propriety the District Court's action in thus entertaining and adjudging the merits of this Petitioner's objections.

Thereby Petitioner's *right to be heard on the merits* became the *law of the case,* binding the District Court, the parties and the Court of Appeals, right or wrong, before the appeal went up to the Court of Appeals.

**For the District Court thus to hear him and decide against him on the merits, and then for the Court of Appeals to refuse him a review on the merits on the grounds that (1) he has no right to be heard on the merits and (2) he was not a party below is not only error but is a violation of fundamental principles. It is a travesty, violating the Fifth Amendment, among other things.**

Note: If the above proposition I is well taken, it conclusively entitles this Petitioner to this Court's writ of certiorari to enforce his right of review.

If the above proposition I is not well taken, Petitioner is nevertheless entitled to certiorari to enforce his right of review, because:

## II.

**The Court of Appeals' opinion and judgment dismissing Petitioner's appeal is based on erroneous premises of fact and law, resulting in serious error and denial of his right of review in a manner plainly violating the Fifth Amendment.**

### A.

This Petitioner's asserted "equitable lien and claim" upon the Meyer part of the Debtor's capital stock constitutes an asserted *property* right in the stock, entitling him to be heard within the plain spirit of Chapter X and the Judicial Code, regardless of technical definitions of "stockholders".

The fact that this Petition is *entitled* to *assert* these two "equitable liens or claims" was established as *res adjudicata* between this Petitioner and these Respondents by the above cited decisions of this same Court of Appeals (*Peckham* v. *Ronrico Corpn., et al.*, 171 F.2d 653, 658, and 211 F.2d 727, 728-730) wherein all these Respondents were parties in person except Casalduc, Trustee of Ronrico Corporation, and Puerto Rico Distillery Company, stockholder of Ronrico Corporation, and these latter two are bound through Ronrico Corporation which was a party.

While not essential to Petitioner's right to be heard, the *importance* of the right in this instance is shown by the following undisputed facts on the face of the last cited two opinions of this Court of Appeals (171 F.2d 653 and 211 F.2d 727) and on the face of the District Court's opinion in this proceeding (Appendix of this Petition, p. 1a, *infra*) showing:

(1) The "lien and claim" asserted in this Petitioner's complaint in his said creditor's suit now amounts to about $1,700,000, and the "lien and claim" asserted in his inter-

vening claim in that suit amounts to about $300,000, principal and interest—whereas the total value of the Meyer part of the Debtor's capital stock subject to these liens is about $1,000,000 according to this Petitioner's objections in the District Court, and is only $244,000 "sale price" to Puerto Rico Distilling Company *free and clear* of both of Petitioner's asserted liens as fixed in the Amended Plan which his appeal challenges.

(2) This excess of Petitioner's asserted "liens and claims" against said stock, over the value of the stock, is the *basis of the adjudication* in said last cited appeal that his second lien and claim is *entitled* to be intervened in the creditor's suit as a matter of *right*,—not a matter of grace or discretion. (*Peckham* v. *Ronrico Corpn., et al.*, 211 F.2d 727).

B.

The contention in the Court of Appeals' opinion that this Petitioner must seek leave in the District Court to be heard on his assert "liens and claims" is plainly erroneous because:

(1) The last cited decision of this Court of Appeals (*Peckham* v. *Ronrico Corpn., et al.*, 211 F.2d 727) adjudges that his "lien and claim" was of a *character* entitling him to be heard as a matter of *right* (not of grace or discretion) and this operates as *res adjudicata* of that point, binding the District Court, Court of Appeals, and all the present Appellees-Respondents, all of whom were parties in said last cited appeal in person or by representation, as above shown.

(2) Apart from the point in the last paragraph (1), the District Court's said opinion in this proceeding plainly shows that this Petitioner's said written Objections were *treated* by the District Court as an application by him to

intervene, or as if he had intervened, in this Chapter X proceeding. This suffices to satisfy any supposed need for an *application* to intervene under Chapter X or under the Rules of Civil Procedure. The effect of the Court of Appeals' opinion on this point is more reactionary than the old common law pleading, contrary to all the spirit and letter of the Rules of Civil Procdure, the Judicial Code, and Chapter X.

## Elaboration of Argument.

### Factual Errors and Omissions in the Opinion Form Erroneous Premises for the Legal Proposition Decided.

The Motion to Dismiss the appeal (p. 6, *supra*) is misleading in its factual statements, inferences and omissions.

The short Court of Appeals "Per Curiam" opinion closely parallels and paraphrases several of these erroneous statements, inferences and omissions. (Compare Opinion in Appendix of this Petition, pp. 14a to 15a, *infra*).

### Part of District Court's Opinion Demonstrating Factual Errors in Court of Appeals' Opinion.

That part of the District Court's Opinion relating to this appellant reads (our italics and emphasis):

> "*Another complicating factor* in the situation of the debtor was the proceeding commenced in this court in 1946 by one R. E. Peckham, (R E. Peckham, Assignee etc., plaintiff vs. Rourico Corporation et al., defendants, Civil Number 4639) who alleged that he was the assignee for the creditors of the Meyer-Kiser Bank, and contended in effect that the money which the Florida Cane Products Corporation had used originally *to acquire a one-half interest in Rourico Corporation* was money belonging to the creditors of the Meyer-Kiser Bank of Indianapolis.

"Subsequently, R. E. Peckham intervened in his original suit in another capacity, claiming to be the trustee holder of a judgment assigned to him from the Liquidation of the Meyer-Kiser Bank of Miami. In his intervention, Peckham made *an alternative attack upon a part of the shares of Ronrico* originally issued to Florida Cane Products Corporation, claiming in essence that the interest of Ferd S. Meyer in the Ferd S. Meyer Puerto Rican *Trust* (and hence his interest in common shares of Ronrico) should properly be applied to the payment of the judgment rendered against Meyer and in favor of the Meyer-Kiser Bank of Miami.

"The complaint in the original Peckham suit was filed on May 20, 1946, and the intervening claim was first filed on July 21, 1947, and again filed on March 9, 1949. For the purposes of this proceeding, the merits of the claims of Peckham in the companion litigation are not material. However, the *existence* of the Peckham litigation, and the *inability of the parties* to conclude it for a period of about 12 years, has left the debtor corporation in a difficult position, in that the *debtor* in its efforts to refinance itself, has *never been able to determine whether it should, or could, properly deal with Meyer* and his group as the *owners* of a substantial block of its stock.

"Under these circumstances, there was some *question* as to whether *any* plan of reorganization of the debtor could be devised which would be *feasible*, and which would at the same time be *fair* and *equitable* to *the interested parties*, and the court has given serious *consideration* as to whether it might not be to the best interests of the *stockholders* of the debtor, *including Peckham*, if the court should make use of the

discretionary powers which it has under the provisions of Section 326 (2) of the Bankruptcy Act to enter an order adjudging the debtor a bankrupt.

"The court has, however, *concluded* that an order adjudging the debtor a bankrupt would be contrary to the best interest of the creditors and stockholders, and that a plan of reorganization should be approved *if* one could be devised which would be fair, equitable, and feasible."

• • •

"On April 28, 1957, Distilling and Meyer entered into an agreement (herein called the "Meyer Agreement") under which Meyer and his group agreed to *sell*, and Distilling agreed to buy, the preferred and common stock held by Meyer and his group, for an aggregate price of $244,000, of which $99,000 *was assigned to the common shares*, and the remainder of $145,000 was assigned to the preferred shares. The agreement contains other provisions, among which is one providing that it is subject to the approval of this court.

"The Meyer Agreement, as written, *cannot* be approved as a *whole* by the court, since the Meyer Agreement *fails to take into consideration the claims of R. E. Peckham*, and contains other provisions which seem to invade the discretionary powers o fthe court. Insofar as the court is concerned, the Meyer Agreement *will* be accepted as stating a *value*, which the Meyer group and Distilling both accept, for the shares of preferred and common stock of the debtor now held by the Meyer group. The plan of reorganization which is now before the court *so provides*. • • •"

• • •

"In the opinion of the court, the plan, as drafted by the Trustee, affords adequate protection for the realization by the *Meyer* group of stockholders of *their equity* in the property of the debtor.

"The *interest* of R. E. Peckham *in* these proceedings presents a more difficult problem. It should be borne in mind that Peckham has presented himself to this court as a *trustee,* both for the creditors of the Meyer-Kiser Bank of Indianapolis, and, in his intervening claim, as Trustee holder of a judgment entered on behalf of the Liquidator of the Meyer-Kiser Bank of Miami against Fred S. Meyer, in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade. In a document filed herein entitled "Peckham's Response Concerning Sections 210 and 211", Jay E. Darlington, in his capacity as attorney for Peckham, has stated under oath that '*Peckham* does not have and never has had any *beneficial* interest in either of these judgment".

"It accordingly follows that Peckham is, and must be treated as, a *fiduciary,* and that this court, sitting as a court of equity, *must consider* and determine whether the proposed plan of reorganization *fairly and equitably deals with the beneficiaries of the two trusts,* and need not necessarily be swayed by the desires either of Peckham or of his counsel, *if* in the judgment of the court the *course* proposed by Peckham or his counsel would fail to give the beneficiaries of the two trusts at least as much protection for the realization by them of the value of *their* contingent equity, if any, in the property of the *debtor,* as is given to the Meyer group.

"There are a limited number of alternative available for the protection of the contingent equity, if any, of the beneficiaries of the two Peckham trusts.

"One alternative, which has been urged by counsel of Peckham, is the *dismissal* of these proceedings. On this point, there is an apparent conflict of interest between Peckham and his counsel and the *beneficiaries* of the two trusts. Mr. Darlington, Peckham's counsel, stated in the document entitled "Peckham's Response Concerning Section 210 and 211", that Darlington "was employed by a written contingent attorney fee contract between Peckham, assignee, and the affiant (Darlington), prior to the commencement of Civil No. 4639". It is obvious that a court of equity cannot give consideration to *such* an interest, but will rather seek the best interests of the ultimate *beneficiaries* of the Peckham trusts.

"It is apparent that a *dismissal* of the proceedings would be at best a *gambler's solution*, since the debtor corporation is now without working capital, and must depend (as it has depended for the last 10 years) upon Distilling if it is to survive at all. * * * (Our italics and emphasis).

Appellees' Record Appendix, pp. A 82-87.

**The Court of Appeals' opinion appears to completely overlook—at least it completely ignores—the contents of the aforesaid District Court's Order of March 21, 1958, overruling Petitioner's objections (p. 5, supra), and the District Court's Opinion which we have quoted supra.**

Incidentally, please observe the peculiar and unprecedented attitude of the District Court in the last paragraphs above quoted, to the effect that the Judge will take it upon himself to gratuitously *intervene* between this appellant Peckham and his counsel on the one hand, and the beneficiaries whom they represent on the other hand

under appointment of an *Indiana court* (171 F.2d 653 and 211 F.2d 727). The Judge himself gratuitously assumed the *role* of *trustee* and *counsel* for this appellant's bene- the latter's counsel as to the *merits* and *wisdom* of what they should do in this Chapter X proceeding,—though at the same time he was acting as Judge as between all the same time he was acting as Judge as between all the parties in the proceeding and was also acting as Judge in the trial then in progress in the above cited civil case.

**Statutes and Cases Dealing with "Appealable Interest" and Right to Appeal.**

**Enlarged Jurisdiction of Courts of Appeals and Supreme Court in Bankruptcy Matters.**

*Present Statute.*

"(a) The United States *court of appeals*, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, *are invested with appellate jurisdiction* from the several courts of bankruptcy in their respective jurisdictions *in proceedings in bankruptcy*, either *interlocutory or final*, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, *both* in matters of *law and in matters of fact*: Provided, however, that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, that when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be *exercised by appeal* and in the *form and manner of an appeal*.

**"(c) The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees, and orders of the United States courts of appeals in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.** As amended May 27, 1926, c. 406, § 9, 44 Stat. 664; June 7, 1934, c. 426, 48 Stat. 926; June 22, 1938, c. 575, §1, 52 Stat. 854; June 25, 1948, c. 646, § 32, 62 Stat. 991; July 7, 1952, c. 579, § 9, 66 Stat. 424." (Our emphasis).

**11 U. S. C. 47**

*Former Statute.*

"(a) The circuit courts of appeals of the United States, and the supreme courts of the Territories in vacation, in chambers and during their respective terms are invested with *appellate jurisdiction of controversies arising in bankruptcy proceedings* from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"(b) The several circuit courts of appeals shall have *jurisdiction in equity,* either interlocutory or final, to *superintend and revise* in matter *of law* the *proceedings* of the several inferior courts of bankruptcy within their jurisdiction. *Such power* shall be exercised on due notice and *petition* by any party aggrieved. * * * (July 1, 1898, c. 541, § 24, 30 Stat. 553; Feb. 13, 1925, c. 229, §§ 1, 5, 13, 43 Stat. 936, 937, 941." (Our emphasis).

11 U. S. C. 47. (Old).

*Absolute Right of Appeal.*

"Sec. 24, sub. a, of the Chandler Act, 52 Stat. 854, 11 U. S. C. § 47, 11 U. S. C. A. § 47, sub. a, gives the Circuit Courts of Appeals appellate *jurisdiction* from courts of bankruptcy 'in *proceedings in bankruptcy, either interlocutory or final*'. An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a *proceeding in bankruptcy.* • • • The amendments to § 24, sub. a, made by the Chandler Act *practically abolished the distinction* between appeals as of right and by leave. • • •". (Our emphasis).

*Albin v. Cowing Pressure Relieving Joint Co.*, (1942) 317 U.S. 211, 212, 63 S. Ct. 170, 171; Reh. den. 317 U.S. 712, 63 S. Ct. 432.

"Section 206 of the Act provides that 'any creditor or stockholders of the debtor shall have the *right to be heard on all* matters arising *in* a proceeding under this chapter'; and the right to be *heard*, thus conferred, *includes the right to appeal. In re: Keystone Realty Holding Co.*, 3 Cir. 1941, 117 F.2d 1003, 1005, 133 A. L. R. 1378; *Dana* v. *S. E. C.*, 2 Cir., 1942, 125 F.2d 542.

"• • • These appellants were afforded ample opportunity to qualify themselves to *vote* on the plan. *But though they failed* to participate at *that* stage of the proceedings, it was proper for the district court, as it did here, to admit them to participation at the hearing on *confirmation* of the plan, having satisfied itself of the authenticity of their claims to be beneficial holders of stockholder interests.

"This brings us to a discussion of the *merits* of the appeal." (Our emphasis).

**Horowitz v. Kaplan, (1 Cir. 1951) 193 F.2d 64, 66 Cert. den. 342 U.S. 946**

**An Interested Party has Right of Appeal from Illegal Plan, Notwithstand Lack of "Value" as Determined for Purpose of Reorganization.**

"Finally, the appellants, (*second mortgage holders*) contend that the court erred in *finding* that two-thirds of the *first* mortgage bondholders had *assented* to the plan. *This* is a question which the appellants *may* raise *despite their lack of any equity in the property.* By subdivision (f) (3) of section 77B (1) U. S. C. A. § 207 (f) (3) acceptance as provided in subdivision (e) (1), U.S.C.A. § 207 (e) (1) is made a *condition precedent to confirmation* of the plan. In *Downtown Inv. Ass'n* v. *Boston Metropolitan Bldgs.*, 81 F. (2d) 314, 321 (C.C.A. 1), it is said that that compliance with subdivision (e) (1) is necessary 'before the court has jurisdiction to confirm a plan.' Whether it is truly jurisdictional we need not decide. Even if it be only a condition precedent to lawful confirmation, an order which confirms a plan *without the requisite consents* may be questioned by a second mortgagee, for *he cannot be deprived of his remedy of rocelosure* merely by proof that the first mortgage indebtedness is *greater* than the value of the property. *Unless* the *statute* takes the remedy away, he may insist upon it. Section 77B does take it away, but *only on condition;* therefore *he may insist that the condition be fulfilled.* • • • • " (Our emphasis).

**In re: Witherbee Court Corporation (2 Cir. 1937) 88 F.2d 251, 254, cert. den. 301 U.S. 701, reh. den. 301 U.S. 715**

**Whether Appellant has an "Appealable Interest" goes to the Merits and was Erroneously Decided on Motion to Dismiss.**

"Appellee seeks to *dismiss* this appeal *because*, it is said appellant has *no interest* in the subject-matter and is *not entitled* to appeal. *Whether* it has such an interest in *the issue* in the case. It *claimed* such interest in the circuit court, and *assigns error* here on the *finding* of that court that it has no such interest. The fact that this issue might be decided against it here *does not warrant the dismissal* of its appeal." (Our emphasis).

*Department of Public Works etc.* v. *Rockwell Cemetery Ass'n.*, (1924) 312 Ill. 232, 143 N.E. 875, 877

"A consideration of the questions raised by the motion to dismiss would *require the same examination* of the evidence offered as would a consideration of the appeal on its *merits*. Motion to dismiss appeals *are not looked upon with favor*." (Our emphasis).

*Davis* v. *F. W. Woolworth Co.*, (10 Cir. 1931) 54 F.2d 366

**Public Interest that Review of this Abuse of Chapter X should not be Suppressed by the Court of Appeals' Technical Refusal to Review the Merits.**

"* * * It was *its duty* to *dismiss the proceeding whenever* it appeared that a fair and equitable *plan was not feasible*, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co.* v. *American National Bank*, 299 U.S. 18, 22, 57 S. Ct. 85, 81 L. Ed. 13. And it has long been the practice of bankruptcy courts to *permit* creditors *or others not entitled* to file pleadings or otherwise contest the allegations of a petition *to move for the vacation of an adjudication or the dismissal of a petition* on grounds, whether strictly jurisdictional or not, *that the proceeding ought not to be allowed to proceed*." (Our emphasis).

**Securities and Exchange Commission v. United States Realty & Improvement Co. (1940), 310 U.S. 434, 457-458, 60 S.Ct. 1044, 1054.**

"*Unless* the District Judge finds that the plan has these *qualities*, he need go no further. Unless he so finds, *he has no authority to proceed.* There is no occasion for the District Judge to consider the constitutional validity of the application of the clauses of subsection (b) (5) if the debtor's proposal is not found to be 'fair' and 'feasible.'" (Our emphasis).

*Tennessee Pub. Co.* v. *American Nat. Bank* (1936) 299 U.S. 18, 22-23; 57 S. Ct. 85, 87.

"Where, as here, *the so-called plan* filed within the time limit set by the court is *not merely a defective* plan, *but is not a Chapter X plan at all*, we would be inclined to hold that, within the meaning of § 236, no plan has been proposed within the time fixed or extended by the judge, and therefore that *termination* of the chapter X proceedings is *mandatory*. We need not rest our decision on this ground, however.

"The present 'plan' as drafted has not been, and could not be, approved by the judge as an acceptable plan under chapter X. Nor should the judge grant further time for the filing of an amended plan if there is no immediate prospect that the debtor could devise an acceptable plan of reorganization, especially since over a *year and a half* has elapsed since the debtor filed its petition under chapter X. In that case, the proceedings under chapter X should be *terminated*. See *Lincoln Alliance Bank & Trust Co.* v. *Dye*, 2 Cir., 1940, 115 F.2d 234. Under §§ 141 and 146 of the Act, 52 Stat. 887, it is provided that the judge at the *outset* shall dismiss a petition by the debtor under chapter X, if satisfied that 'it is *unreasonable to expect* that a plan of reorganization can be effected.' If the petition *has* been approved, *and it later becomes evident* to the judge that there is no reasonable prospect of

effecting a plan of reorganization, it *then* becomes *his duto to terminate* the chapter X proceedings, pursuant to § 236, above quoted." (Our emphasis).

**John Hancock Mut. Life Ins. Co. v. Casey, (1 Cir. 1944), 141 F.2d 104, 107; Cert. denied 323-713.**

**Dismissal of Appeal Violates Appellant's Rights Under the Fifth Amendment.**

**While ordinarily, the right of appeal is not guaranteed by the Fifth Amendment in Federal Courts or the Fourteenth Amendment in State Courts,—the "Due Process Clause" does forbid arbitrary discrimination or withholding of a right of appeal which Congress or the Legislature has granted:**

"* * * While due process under the Fifth Amendment, as under the Fourteenth, does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations."

"* * * The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

**Boykin v. Huff, (C.A., D.C., 1941) 121 F.2d 865, 872.**

"Petitioner applied to the United States District Court, Northern District of California, Southern Division, for a writ of habeas corpus, claiming that his automatic appeal to the California Supreme Court from a conviction for a capital offense had been heard upon a fraudulently prepared transcript of the trial proceedings. * * * The District Court, without issuing

the writ or an order to show cause, dismissed the application as not stating a cause of action. 128 F. Supp. 600. The Court of Appeals affirmed the order of the District Court. 9 Cir., 221 F.2d 276. *The charges of fraud as such set forth a denial of due process of law in violation of the Fourteenth Amendment.* See *Mooney* v. *Holohan,* 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791. Without intimating any opinion regarding the validity of the claim, we hold that in the circumstances disclosed by the record before us the application should not have been summarily dismissed. Accordingly, the petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing."

**Chessman v. Teets (1955) 350 U.S. 3, 76 S.Ct. 34.**

## Conclusion.

Wherefore the Petitioner prays that this Court may issue a Writ of Certiorari requiring said Court of Appeals to vacate its said judgment and opinion dismissing his appeal, and for all other just and proper relief in the premises.

*Attorney for Petitioner*
JAY E. DARLINGTON,

## APPENDIX.

### District Court's Opinion.

[Filed April 8, 1958.]

This is a proceeding under the provisions of Chapter X of the Bankruptcy Act, initiated by the debtor, Ronrico Corporation (hereinafter called "Ronrico") on April 6, 1956. On that same date, a Trustee was appointed by this court, and a hearing was set for May 18, 1956 to consider any relevant matters that might be brought to the attention of the court. At the hearing on May 18, 1956, no objections were made by any interested party, either to the order approving the petition of the debtor, to the appointment of the trustee, or to any other relevant matter.

The Trustee so appointed has continued to operate the business of the debtor, since his appointment, and up to the present time, relying principally upon a production and financing arrangement with Puerto Rico Distilling Company (hereinafter called "Distilling"), which was approved by the court.

The reasons which impelled the debtor to invoke the jurisdiction of this court under the provisions of Chapter X of the Bankruptcy Act are set forth at length in the debtor's petition, in which the debtor alleges in substance that it is unable to meet its obligations as they mature, and that it has been prevented by a conflict between its stockholders from obtaining additional risk capital which it urgently needs. The debtor had substantial earnings during the war years, between 1941 and 1946, and paid out approximately $2,600,000 in dividends and royalties to its stockholders during the period. In 1947 the market for the debtor's product collapsed, and debtor's sales of rum

in the market in Continental United States dropped from 239,024 cases in 1946 to 21,321 cases in 1947. As a result the debtor found itself heavily indebted to banks and others, without other means for payment except through a liquidation of its stocks of aged rum.

The stockholders of the debtor made various efforts to meet the situation, apparently in the hope that the difficulties in which the debtor found itself in 1947 would be temporary. In 1947, the debtor raised an additional $250,000 in capital by the issuance of its preferred stock for that amount to its stockholders.

The debtor's situation did not improve, and the additional capital provided by the preferred stock issue was insufficient to meet the debtor's problems. A second effort was made, late in 1947, to provide the debtor with further funds, in the form of a mortgage loan from Distilling in the amount of $100,000.00.

This also proved insufficient, and a third effort was made on July 14, 1948, when the two principal stockholders of the debtor (Puerto Rico Distilling Company and the Ferd S. Meyer Puerto Rican Trust) entered into an agreement (sometimes called the "Agreement of July 14, 1948"), by which Distilling undertook and agreed to make such loans to the debtor as the latter might require for a period of one year, but not in excess of $150,000.00. As security for the repayment of these loans, the debtor assigned to Distilling its trademarks and the business and good will of the business appurtenant thereto; and turned the management of its business and affairs over to an Executive Committee of the debtor's Board of Directors. Three members of the Executive Committee were nominees of Distilling and two, nominees of the Ferd S. Meyer Puerto Rican Trust.

The $150,000.00 originally provided in the Agreement of July 14, 1948 also proved insufficient for the debtor's needs, and without further formal agreement, Distilling continued its advances under the Agreement of July 14, 1948, until on April 6, 1956, the total amount owing by the debtor to Distilling by reason of loans and advances made under the Agreement aggregated $370,304.33.

A still further effort was made to solve the problems of the debtor on March 11, 1952, when Distilling purchased from the debtor its stocks of aged rum and the barrels containing the same for $530,111.31, which was in effect used to pay off the remaining balance owing by the debtor to the banks, and to reduce the indebtedness of the debtor to Distilling.

As was permitted under the Agreement of July 14, 1948, Distilling, as of September 1, 1952, took over the production and sale of the debtor's products, which it continued, except for a short period, up to the date of the appointment of the Trustee in this proceeding.

The debtor made one final effort to refinance itself at a meeting of its Board of Directors on January 18, 1956, at which the Board proposed, subject to approval of the stockholders, to accept an offer to Distilling to subscribe for not more than 44,500 shares of common stock of the debtor, at a price of $16.80 per share, upon condition, however, that Distilling should acquire not less than 35,000 shares of the new issue.

Ferd S. Meyer, as Trustee of the Ferd S. Meyer Puerto Rican Trust, countered this effort of the Board of Directors of the debtor by a stockholders' suit in the Chancery Court of Delaware; and as a result of the filing of this suit, Distilling withdrew its offer to purchase shares of

the debtor, and the Board of Directors of the debtor filed the debtor's petition which initiated this proceeding.

The debtor's efforts to refinance itself were further complicated by other factors. The debtor was conceived of initially as a sort of corporate partnership between Distilling and Florida Cane Products Corporation (later substituted by the Ferd S. Meyer Puerto Rican Trust), for the purpose of marketing the products of Distilling, principally rum under the trademark "Ronrico". Voting trust agreements were set up in which control of the debtor was shared equally by the two groups of stockholders, who were equally represented on the Board of Directors, and equally represented in management by two officers called co-chief executives. A second voting trust, known as the Ferd S. Meyer Puerto Rican Trust was created to hold the shares originally issued to Florida Cane Products Corporation. Although this latter voting trust expired in 1955, the trustee, Ferd S. Meyer, refused to assent to its termination.

Another complicating factor in the situation of the debtor was the proceeding commenced in this court in 1946 by one R. E. Peckham, (R.E. Peckham, Assignee etc., plaintiff vs. Ronrico Corporation et al., defendants, Civil Number 4639) who alleged that he was the assignee for the creditors of the Meyer-Kiser Bank, and contended in effect that the money which the Florida Cane Products Corporation had used originally to acquire a one-half interest in Ronrico Corporation was money belonging to the creditors of the Meyer-Kiser Bank of Indianapolis.

Subsequently, R. E. Peckham intervened in his original suit in another capacity, claiming to be the trustee holder of a judgment assigned to him from the Liquidation of the Meyer-Kiser Bank of Miami. In his intervention, Peck-

ham made an alternative attack upon a part of the shares of Ronrico originally issued to Florida Cane Products Corporation, claiming in essence that the interest of Ferd S. Meyer in the Ferd S. Meyer Puerto Rican Trust (and hence his interest in common shares of Ronrico) should properly be applied to the payment of the judgment rendered against Meyer and in favor of the Meyer-Kiser Bank of Miami.

The complaint in the original Peckham suit was filed on May 20, 1946, and the intervening claim was first filed on July 21, 1947, and again filed on March 9, 1949. For the purposes of this proceeding, the merits of the claims of Peckham in the companion litigation are not material. However, the existence of the Peckham litigation, and the inability of the parties to conclude it for a period of about 12 years, has left the debtor corporation in a difficult position, in that the debtor in its efforts to refinance itself, has never been able to determine whether it should, or could, properly deal with Meyer and his group as the owners of a substantial block of its stock.

Under these circumstances, there was some question as to whether any plan of reorganization of the debtor could be devised which would be feasible, and which would at the same time be fair and equitable to the interested parties, and the court has given serious consideration as to whether it might not be to the best interests of the stockholders of the debtor, including Peckham, if the court should make use of the discretionary powers which it has under the provisions of Section 236 (2) of the Bankruptcy Act to enter an order adjudging the debtor a bankrupt.

The court has, however, concluded that an order adjudging the debtor a bankrupt would be contrary to the best interest of the creditors and stockholders, and that a plan

of reorganization should be approved if one could be devised which would be fair, equitable, and feasible.

From the history of the debtor, from the report of the appraisers, and from the operations of the debtor's business by the Trustee, it is apparent that future profitable operations of the debtor's business is at best speculative. It is also apparent from these same sources that the debtor has no chance of subsisting alone, in the sense that the debtor has at all times since its inception relied upon Distilling for the production of its products and in other material ways. A separation of the debtor from Puerto Rico Distilling Company would seem to be impracticable from a business standpoint.

It would thus seem to follow that any plan of reorganization to be feasible, must provide for a continuance of the relationship between the debtor and its source of supply, namely, Puerto Rico Distilling Company. For other reasons, which will presently appear, the exact relationship between Distilling and a reorganized debtor, is a matter which should be left to the discretion of Distilling.

Because of the speculative nature of the debtor's business, it would seem that no plan of reorganization would be fair and equitable to the creditors and stockholders of the debtor other than Puerto Rico Distilling Company which would not provide for the payment of all creditors in full, and for the realization by such stockholders of the present value of their interests in the debtor. Similar reasoning applies to the interest of Distilling in the reorganized company. Neither this court, nor any other court, can by any plan of reorganization, give to Distilling anything more than a fair chance to recover its claims against the debtor, now amounting to more than $500,000. The balance sheet of the debtor, as of July 31, 1957, which

is contained in the report of the appraisers, shows a deficit in the stockholders' equity in the debtor of about $300,000, which has undoubtedly been increased since that time. The appraisers, by projecting assumed earnings over a period of years, have, for the purposes of their appraisal, eliminated ths deficit, and have come up with a stockholders' equity of $52,937. This is predicated, however, upon the integrated operation of the debtor, Distilling, and the distributor of the debtor's products. Such an integration is, of course, beyond the power of this court. The most that this court can do is to place the interested parties in such a position that they can effect such an integration if they see fit.

No question has been raised as to the desirability of paying all creditors, other than Puerto Rico Distilling Company, in full; and the plan which is now before the court for approval, expressly so provides.

On April 28, 1957, Distilling and Meyer entered into an agreement (herein called the "Meyer Agreement") under which Meyer and his group agreed to sell, and Distilling agreed to buy, the preferred and common stock held by Meyer and his group, for an aggregate price of $244,000, of which $99,000 was assigned to the common shares, and the remainder of $145,000 was assigned to the preferred shares. The agreement contains other provisions, among which is one providng that it is subject to the approval of this court.

The Meyer Agreement, as written, cannot be approved as a whole by the court, since the Meyer Agreement fails to take into consideration the claims of R. E. Peckham, and contains other provisions which seem to invade the discretionary powers of the court. Insofar as the court is concerned, the Meyer Agreement will be accepted as stat-

ing a value, which the Meyer group and Distilling both accept, for the shares of preferred and common stock of the debtor now held by the Meyer group. The plan of reorganization which is now before the court so provides. The Meyer agreement seems to have been reached by fair negotiation between the interested parties, and there appears to be no reason to disregard it. Failure to accept the valuation placed by Distilling and Meyer on the Meyer shares would leave the court with no recourse other than to turn to the valuation placed upon these same shares by the report of the appraisers, which would be distinctly disadvantageous to Meyer, and consequently to Peckham. The Meyer Agreement, by valuing the preferred and common shares now held by Meyer, in effect places a valuation of $590,000 upon the stockholders' equity in the debtor, while the report of the appraisers reaches a figure of $52,937.00.

The court will disregard so much of the Meyer Agreement as purports to dispose of the funds which will be deposited in this proceeding pursuant to the Meyer Agreement, to the extent that the interests of Peckham may be adversely affected thereby.

In the opinion of the court, the plan, as drafted by the Trustee, affords adequate protection for the realization by the Meyer group of stockholders of their equity in the property of the debtor.

The interest of R. E. Peckham in these proceedings presents a more difficult problem. It should be borne in mind that Peckham has presented himself to this court as a trustee, both for the creditors of the Meyer-Kiser Bank of Indianapolis, and, in his intervening claim, as Trustee holder of a judgment entered on behalf of the Liquidator of the Meyer-Kiser Bank of Miami against Ferd S. Meyer.

in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for the County of Dade. In a document filed herein entitled "Peckham's Response Concerning Sections 210 and 211", Jay E. Darlington, in his capacity as attorney for Peckham, has stated under oath that "Peckham does not have and never has had any beneficial interest in either of these judgments".

It accordingly follows that Peckham is, and must be treated as, a fiduciary, and that this court, sitting as a court of equity, must consider and determine whether the proposed plan of reorganization fairly and equitably deals with the beneficiaries of the two trusts, and need not necessarily be swayed by the desires either of Peckham or of his counsel, if in the judgment of the court the course proposed by Peckham or his counsel would fail to give the beneficiaries of the two trusts at least as much protection for the realization by them of the value of their contingent equity, if any, in the property of the debtor, as is given to the Meyer group.

There a limited number of alternative available for the protection of the contingent equity, if any, of the beneficiaries of the two Peckham trusts.

One alternative, which has been urged by counsel of Peckham, is the dismissal of these proceedings. On this point, there is an apparent conflict of interest between Peckham and his counsel and the beneficiaries of the two trusts. Mr. Darlington, Peckham's counsel, stated in the document entitled "Peckham's Response Concerning Section 210 and 211", that Darlington "was employed by a written contingent attorney fee contract between Peckham, assignee, and the affiant (Darlington), prior to the commencement of Civil No. 4639". It is obvious that a court of equity cannot give consideration to such an interest, but

will rather seek the best interests of the ultimate beneficiaries of the Peckham trusts.

It is apparent that a dismissal of the proceedings would be at best a gambler's solution, since the debtor corporation is now without working capital, and must depend (as it has depended for, the last 10 years) upon Distilling if it is to survive at all. Very substantial sums of money must be invested in the debtor if it is eventually to become profitable. In case of a dismissal, the court would have no power to assure itself that such sums of money would be invested, or to control in any way the form and manner of such investment, if any should be made.

Various avenues would be open to Puerto Rico Distilling Company if no plan of reorganization should be approved. The most obvious would be to insist upon an adjudication in bankruptcy under section 236 of the Bankruptcy Act. Another would be to supply the debtor corporation with funds by the purchase of common stock. Since it has been determined by the appraisal that the present common stock is without value, there would be no reason why Distilling should not in such case re-finance the debtor corporation so as to freeze out the minority interest upon which Peckham claims a lien.

An adjudication in bankruptcy would be ruinous, to all parties concerned. In view of the appraiser's report, the existing capital deficit and the resulting stoppage of business the estate would lose its going concern value, the properties would have to be sold at a fair upset price, the trademarks, trade name and good will, if any, would probably become worthless and in all probability, no equity would be available to the preferred and common stock, and, the Peckham beneficiaries would have nothing upon which to exercise their claimed equitable lien upon the

stock owned by the Meyer group in the debtor corporation.

There are probably other solutions which Distilling might find to the problem. It is quite obvious from the course of these proceedings that Distilling would not willingly continue as Peckham's partner in any enterprise. It is not necessary or feasible for the purposes of this opinion to speculate as to how such a relationship would be terminated. It is sufficient to say that a dismissal of these proceedings would not carry any assurance that the beneficiaries of the two Peckham trusts would receive anything out of the shares of stock of the debtor upon which they now claim a lien.

On the other hand, a dismissal of these proceedings would be distinctly unfair to Distilling. As is evidenced by the Trustee's report under Section 167 of the Bankruptcy Act, which was approved by order entered herein on May 3, 1957, the Trustee has found no evidence of fraud, mismanagement, misconduct, or irregularity in the conduct of the debtor's business by Distilling. If guilty of anything, Puerto Rico Distilling Company has been guilty of an excess of zeal in its efforts to keep the debtor afloat for the past 11 years. The history of the debtor indicates that Distilling would have been in a much more advantageous position if it had not attempted to support the debtor; and that the Meyer group, and consequently the Peckham beneficiaries, would have had nothing to litigate over if Distilling had withdrawn its financial support from the debtor in 1947, as it might have or if Distilling had awaited the report of the appraisers before making the Meyer Agreement.

Notwithstanding these facts, which should have been apparent both to Meyer and Peckham, both have asserted

claims of fraud, mismanagement, misconduct, and irregularity in the conduct of the business of the debtor by Distilling. Meyer in fact precipitated these proceedings by the commencement of an action in the Chancery Court in Delaware; and Peckham, through his counsel Parlington, and notwithstanding the report of the Trustee [illegible] Section 167 of the Bankruptcy Act, and the orde[illegible]f May 3, 1957 approving the Trustee's Report, has persistently reiterated the same charges.

There is nothing in the record in these proceedings, not anything in the report of the Trustee under Section 167, or otherwise presented to the court, which would indicate any ground for penalizing Distilling, or affording any ground which Distilling should not receive from these proceedings such opportunity as the court can give it, for the eventual realization of the substantial sums of money which Distilling has invested in, and must later invest in, the debtor, if it is to recover its present investment. Similarly, there is no reason why Distilling should in the future be menaced by suits and proceedings which can be fairly and equitably settled in these proceedings.

The same considerations which make a dismissal of these proceedings undesirable, are applicable to any plan of reorganization which would permit Peckham or the beneficiaries of the Peckham trusts to retain any interest in, or lien upon, the stock of the debtor. Any effort upon the part of Peckham to retain such an interest or lien in a plan of reorganization, is as much a gambler's solution of his problem, as would be a dismissal. The problem of financing the debtor's continuing business remains unchanged, and the interest of the Peckham beneficiaries would still remain subject to the risks of the business. If the business of the reorganized debtor should be success-

ful, and Peckham should succeed in establishing his claim to the shares, or any part of them, formerly belonging to the Meyer group, Peckham would in such event seem to have obtained a windfall. All risks of the reorganized corporation would be upon Distilling. Neither Peckham nor his beneficiaries would, or could, participate in the financing or the management of the reorganized corporation. Should the business of the reorganized corporation, so managed and financed, be unsuccessful, it is not improbable that Distilling would eventually be faced with a stockholder's suit by Peckham or his beneficiaries. Even an unsuccessful suit of this kind would be expensive, troublesome, and embarrassing to Distilling, and the risk of such an action would tend to hamper and hinder the rehabilitation of the debtor.

It is unlikely that Distilling would accept such a risk, and it would be unfair and inequitable to ask it to do so. It is the opinion of the Court that any plan of reorganization which would perpetuate, even in part, the situation which led to these proceedings, and which would subject Distilling to the risk of a repetition of the circumstances giving rise to these proceedings, would be unfair and inequitable, and in all likelihood, not feasible.

The court is accordingly of the opinion that the plan, as submitted by the Trustee, is fair, equitable and feasible and an order approving the same shall be entered.

San Juan, P. R., on this 8th day of April, 1958.

CLEMENTE RUIZ NAZARIO
United States District Judge

## Court of Appeals' Opinion.

[November 21, 1958]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

PER CURIAM.

In protracted litigation R. E. Peckham as plaintiff and as an intervenor has been seeking for years and is still seeking to establish and enforce an equitable lien upon or claim to shares of stock in Ronrico Corporation, a corporation organized under the laws of Puerto Rico. For a description of the nature of his claims and of past phases of this protracted litgation see the opinions of this court in *Peckham* v. *Ronrico Corp.*, reported in 1948, 171 F.2d 653, and in 1954, 211 F.2d 727.

While this litigation remained pending and undetermined in the court below, the Ronrico Corporation on April 6, 1956, filed a voluntary petition in that court seeking reorganization under Chapter X of the Bankruptcy Act. Reorganization proceedings in the regular course followed which culminated eventually in orders classifying creditors and stockholders and confirming an amended plan of reorganization. Peckham was given notice of the various steps as taken in the reorganization proceedings and participated through his counsel in some of them. Now he has appealed from the District Court's order approving an amended plan of reorganization of the Ronrico Corporation and also from orders of that court granting the Trustee's petition for classification of creditors, granting Puerto Rico Distilling Company's petition to amend the plan as already amended, and confirming the plan as thus amended. The matter presently before us is Puerto Rico Distilling Company's motion as

holder of one half of the stock of Ronrico and as its principal creditor to dismiss Peckham's appeals on a number of grounds. We think it clear that the motion to dismiss must be granted for the reason, if for no other, that Peckham never became a party to the proceedings in the lower court.

Peckham is neither a creditor of Ronrico nor is he one of its stockholders. Thus he does not have "the right to be heard on all matters arising in a proceeding" for reorganization under Chapter X of the Bankruptcy Act conferred by § 206 of the Act. 11 U.S.C.A. § 606. Whatever right he might have to be heard in these proceedings, including the right to appeal, *Horowitz* v. *Kaplan*, 1 Cir., 1951, 193 F.2d 64, 66, certiorari denied 1952, 342 U.S. 946, 72 S.Ct. 561, 96 L.Ed. 704, can arise only under § 207 of the Act, 11 U.S.C.A. §607, which, insofar as relevant, provides: "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter." It is true that the referee, in the course of holding in the capacity of Special Master that Peckham could not be deemed a creditor of the debtor, recommended that Peckham be permitted to intervene in the Chapter X proceedings, if, indeed, he had not already been permitted to do so, "with respect to any proposal of the trustee concerning the stock on which [he] claims an equitable lien." But the fact remains that at no time in these proceedings has Peckham ever made any attempt to intervene by serving an appropriate motion in accordance with the procedure set out in Rule 24(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The fact that the court below allowed him to be heard and to participate in the proceedings by filing objections, being heard in argument etc. does not serve to make him a party. In re South State Street Bldg. Corp., 7 Cir., 1943, 140 F.2d

363, 366, certiorari denied sub nom. *Hofheimer* v. *Gold*, 1944, 322 U.S. 761, 64 S.Ct. 1279, 88 L.Ed. 1588. Nor do the privileges accorded to him in the court below give him the right to appeal as a party from any decree of that court. *Public Service Commission* v. *Philadelphia Rapid Transit Co.*, 3 Cir., 1935, 82 F.2d 481, 487, certiorari denied. *Citizens Passenger Railway Company of Philadelphia* v. *Public Service Commission*, 1936, 298 U.S. 673, 56 S.Ct. 938, 80 L.Ed. 1395.

An order will be entered dismissing these appeals.

FILE COPY

Supreme Court, U.S.
FILED
MAR
JAMES

# Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 716.

R. E. PECKHAM, ASSIGNEE AND TRUSTEE,
PETITIONER,

*v.*

JOSE E. CASALDUC, TRUSTEE, ETC., ET AL.,
RESPONDENTS.

## BRIEF OF PUERTO RICO DISTILLING COMPANY IN OPPOSITION TO PETITION OF R. E. PECKHAM FOR WRIT OF CERTIORARI.

HAROLD A. SEGALL,
52 Wall Street,
New York 5, New York,
Attorney for Puerto Rico
Distilling Company.

Of Counsel,
H. S. MCCONNELL,
P.O. Box 4224,
San Juan 21,
Puerto Rico.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON

## Table of Contents.


| | |
|---|---|
| Questions presented for review | 1 |
| Statement of the case | 2 |
| Proceedings in the lower courts | 2 |
| The Peckham case | 8 |
| Argument | 12 |
| Point One. The petition for writ of certiorari states no ground under Rule 19 for issuance of a writ of certiorari | 12 |
| Point Two. The Court of Appeals correctly dismissed petitioner's appeals on the ground that petitioner had failed to become a party to the proceedings in the District Court | 14 |
| Point Three. The result reached by the Court of Appeals was correct on other grounds | 18 |
| A. Petitioner had no appealable interest in any of the orders from which he purportedly appealed | 18 |
| B. The appeals are mere collateral attacks upon prior orders of the District Court which are now final and unappealable | 22 |
| C. An order approving a plan of reorganization under section 174 of the Act is not an appealable order | 24 |
| D. The appeals taken on June 13, 1958, were prematurely taken, and the Court of Appeals was without jurisdiction to hear the same | 25 |
| Conclusion | 32 |

## Table of Authorities Cited.

CASES.

Central States Electric Corp., In re, 206 F. 2d 70; cert. den. sub nom. Henis v. Egan, 346 U.S. 899, 74 S. Ct. 225, 98 L. Ed. 399 15

Forstner Chain Corp., In re, 177 F. 2d 572 29

Hoehn v. McIntosh, 110 F. 2d 199 25

Irving-Austin Building Corp., In re, 96 F. 2d 905 24

Kenmore-Granville Hotel Co., In re, 92 F. 2d 778; cert. den. sub nom. Meyer v. Kenmore Granville Hotel Co., 302 U.S. 767, 58 S. Ct. 481, 82 L. Ed. 596 12

Levitt, Ex parte, 302 U.S. 633, 58 S. Ct. 2, 82 L. Ed. 493 19

Louis Joilet Garage Corp., Matter of, 100 F. 2d 751 24

Marcy v. Miller, 95 F. 2d 611 24

Michigan-Ohio Bldg. Corp., In re, 117 F. 2d 191 19

South State Street Bldg. Corp., In re, 140 F. 2d 363; cert. den. sub nom. Hofheimer v. Gold, 322 U.S. 761, 64 S. Ct. 1279, 88 L. Ed. 1588 14, 15

Stevens v. Turner, 222 F. 2d 352 31

Trust No. 2988 of Foreman Trust & Savings Bank, In re, 85 F. 2d 942; cert. den. sub nom. Tetzke v. Trust No. 2988, 299 U.S. 609, 57 S. Ct. 235, 81 L. Ed. 450 12, 13, 23

United States v. Crescent Amusement Co., 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160 30

United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 721 28, 29

V-I-D, Inc., In re, 177 F. 2d 234; cert. den. sub nom Glover v. Coffing, 339 U.S. 904, 70 S. Ct. 518, 94 L. Ed. 1333 16

V-I-D, Inc., In re, 226 F. 2d 113; cert. den. sub nom. Kelley, Glover & Vale, Inc., v. Coffing, 350 U.S. 968, 76 S. Ct. 437, 100 L. Ed. 840; rehearing den. 351 U.S. 915, 76 S. Ct. 693, 100 L. Ed. 1449 17, 19, 20, 21

Wright v. Gibson, 128 F. 2d 865 30

STATUTES, ETC.

U.S. Constitution, Fifth Amendment 17
U.S. Constitution, sec. 8, cl. 4 14

Chandler Act, 18 U.S.C. §§ 151 et seq. 13
Bankruptcy Act, chapter X
Sec. 24 25, 27
Sec. 25 27, 28
Sec. 77B 12, 13
Sec. 101-276 15
Sec. 161 3
Sec. 167 3, 20, 23
Sec. 169 4
Sec. 174 2, 7, 24
Sec. 175 7
Sec. 180 24
Sec. 206 12, 15
Sec. 207 4, 13, 14, 15, 16
Sec. 236 23

Bankruptcy General Orders Nos. 36 and 37 28

Federal Rules of Civil Procedure, Rule 58 28, 29
Rules of U.S. Supreme Court, Rule 19(b) 1, 12

TEXTBOOK

Collier on Bankruptcy (14th ed.) vol. 6, pp. 2900, 2901 13

# Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 716.

R. E. PECKHAM, ASSIGNEE AND TRUSTEE,
PETITIONER,

*v.*

JOSÉ E. CASALDUC, TRUSTEE, ETC., ET AL.,
RESPONDENTS.

## BRIEF OF PUERTO RICO DISTILLING COMPANY IN OPPOSITION TO PETITION OF R. E. PECKHAM FOR WRIT OF CERTIORARI.

### Questions Presented for Review.

The questions presented for review on this petition for writ of certiorari are as follows:

1. Has petitioner set forth a ground for invoking the discretionary jurisdiction of this Court, under the provisions of Rule 19(b) of the Rules of this Court?

2. Did the Court of Appeals for the First Circuit correctly and properly dismiss the appeals of petitioner?

The second question involves a consideration of the result, as well as the language, of the opinion of the Court of Appeals. As appears from the Petition (p. 7), five separate grounds for dismissal were presented to the Court of Appeals. The Court of Appeals selected one of these, stating (261 F. 2d 121, 122):

> "We think it clear that the motion to dismiss must be granted for the reason, *if for no other*, that Peckham never became a party to the proceedings in the lower cor " (Italics supplied.)

The subsidiary questions thus presented are as follows:

(*a*) Did the Court of Appeals correctly dismiss the appeals on the ground that petitioner failed to become a party to the proceedings in the District Court?

(*b*) Would the Court of Appeals have acted correctly in dismissing the appeals on the ground that petitioner had no appealable interest in any order from which he purportedly appealed?

(*c*) Would the Court of Appeals have acted correctly in dismissing the appeals on the ground that the appeals were mere collateral attacks on prior orders of the District Court, which are now final and unappealable?

(*d*) Would the Court of Appeals have acted correctly in dismissing the appeal from the order of April 8, 1958, on the ground that an appeal from an order approving a plan of reorganization under section 174 of the Act lacks the requisite finality for an appeal?

(*e*) Would the Court of Appeals have acted correctly in dismissing the appeals taken on June 13, 1958, on the ground that they were prematurely taken, and that as a result the Court of Appeals was without jurisdiction to hear the same?

## Statement of the Case.

### Proceedings in the Lower Courts.

On April 6, 1956, Ronrico Corporation (hereinafter sometimes called the "debtor") filed a voluntary petition seeking reorganization under the provisions of chapter X of the Bankruptcy Act (hereinafter called the "Act") (Record Appendix, A1) and on the same day the judge of the United States District Court for the District of Puerto Rico entered an order appointing Mr. José E. Casaldúc as trustee (Record Appendix, A11). The trustee qualified on April 10, 1956, and on April 11, 1956, notice was given to all

creditors and stockholders, and to others who might be interested in the proceeding, including R. E. Peckham (hereinafter called "Peckham"), that a hearing would be held before the lower court on May 18, 1956, pursuant to the provisions of section 161 of the Act.

There were no appearances at the hearing on May 18, 1956, and the trustee continued in possession, operating the business of the debtor without objection from anyone, including Peckham. Among the duties which the trustee discharged was the filing of his report (Record Appendix, A16) as required by the order of his appointment and by section 167 of the Act. This report was filed on March 20, 1957, and copies were furnished to all persons who might be interested, including Peckham (Record Appendix, A17). On April 5, 1957, the lower court entered an order reciting the filing of the trustee's report, and setting a hearing for May 3, 1957, for the purpose of hearing any evidence presented by any interested party who might feel aggrieved by the trustee's said report. Notice of this order was given to Peckham. Peckham did not appear at this hearing, and offered no evidence with respect to the trustee's report, and on May 3, 1957, the lower court entered an order approving the report of the trustee (Record Appendix, A17). No objection was made to, and no appeal was taken from, this order by R. E. Peckham.

The reorganization proceeding itself was precipitated by differences and conflicts between the two major groups of stockholders in the debtor corporation; that is, between Ferd S. Meyer (hereinafter called "Meyer"), as trustee of the Ferd S. Meyer Puerto Rican Trust, and Puerto Rico Distilling Company. In fact, as is set out in the initial petition, the precipitating factor for the entire proceeding was the filing by Meyer of a stockholders' suit in the Court of Chancery of the State of Delaware in and for New Castle County.

The trustee's report of March 20, 1957, had the effect of settling the Delaware suit, and Meyer at first filed objec-

tions to the trustee's report (Record Appendix, A17, A18). However, on April 28, 1957, and in anticipation of the hearing set for May 3, 1957, on the trustee's report, the two contending parties, Meyer and Puerto Rico Distilling Company, entered into a memorandum agreement by which they endeavored, subject to the approval of the lower court, to settle their differences. The memorandum is copied in full in the Amended Plan of Reorganization (Record Appendix, A49) and is in fact made a part of the Plan for certain purposes. It will sometimes be referred to herein after as the "Memorandum of April 28, 1957."

The situation having been thus clarified by the trustee's report, by the Memorandum of April 28, 1957, and by the order of May 3, 1957, approving the trustee's report, the trustee considered that the time was ripe for preparation and presentation of a plan of reorganization, which the trustee presented on May 13, 1957 (Record Appendix, A47, A48). On the same day the lower court entered an order directing that copies be sent to all persons who might be interested, including Peckham, and set June 14, 1957, as the date upon which the lower court would hold the hearing required by section 169 of the Act.

At this juncture, approximately fourteen months after the commencement of the reorganization proceedings, Peckham made, or purported to make, his first appearance, by filing, or purporting to file, through his counsel Jay E. Darlington, three documents, entitled: "Motion of R. E. Peckham to Dismiss the Proceedings" (Record Appendix, A19), "Claims of R. E. Peckham, as Assignee and Trustee for Creditors" (Record Appendix, A20) and "Objections of R. E. Peckham to the Trustee's Proposed Plan" (Record Appendix, A30).

These documents were tendered for filing without prior leave of the lower court; without the filing of any petition for leave to intervene under section 207 of the Act; and without the entry of any order, formal or informal, allowing Peckham to intervene in the reorganization proceed-

ings. No petition for leave to intervene and no order allowing intervention was ever subsequently entered.

The proceedings in the lower court subsequent to the appearance of Peckham are summarized in the order of the lower court, entered on March 21, 1958 (Record Appendix, A74), overruling Peckham's objections to the Amended Plan of Reorganization and denying his motion to dismiss, as follows:

> "Peckham, through his counsel, filed certain objections to the plan as proposed by the Trustee, and filed also a motion to dismiss the proceedings. The motion to dismiss and the objections were essentially based upon the same propositions, which for the most part were argumentative, and not supported by any evidence in the record. One point, which deserved consideration, was the contention that the proposed original plan involved, in substance, a sale of the shares of capital stock of the debtor upon which Peckham claimed a lien, at a price which was alleged to be 'less than one-tenth of its actual fair value'.
>
> "In order to properly consider this objection, the Court at the suggestion of the Trustee, deferred consideration of the proposed plan, and directed that the assets and going concern value of the debtor be appraised by disinterested appraisers. The report of the appraisers was filed with the Court on November 4, 1957, from which it appears that upon the most favorable view of the situation, there is no basis whatsoever for the allegations made on behalf of Peckham to the effect that the provisions in the plan of reorganization were in any way unfair to the common stockholders of the debtor. On the contrary, it appears affirmatively that there is no equity in the debtor for the common stockholders, and that at most the equity for the holders of preferred stock amounts to $52,937.00.

"Peckham, through his counsel, objected to the report of the appraisers; and, as appears from the order entered herein on December 26, 1957, the objections, after hearing, were dismissed, and the report of the appraisers was accepted as an adequate, fair, and proper appraisal of the debtor's property and going concern value, for use by the Trustee in the formulation of a plan of reorganization or as a basis for a report to the Court of his reasons why a plan cannot be effected.

"On January 23, 1957, the Trustee filed an amended plan of reorganization, and by order entered on the same date, the Court directed that copies of the amended plan be furnished to the interested parties, including counsel for Peckham, and fixed February 28, 1958 as a date for a hearing to consider any objections, amendments, or other plans, as might be made or proposed by the debtor, any creditor or stockholder, or any other person or party in interest. No objections were filed to the amended plan, except on behalf of Peckham, who reiterated his original objections and added others of the same nature.

"No evidence has at any time been offered to the Court by Peckham in support of the original objections, filed on June 11, 1957; and no evidence was offered at the hearing of February 28, 1958 in support of either the old or the new objections. In fact, the new objections do not contemplate the introduction of evidence, but in each paragraph expressly rely upon what appears on the face of the amended plan and in the record of the proceedings.

"At the hearing on February 28, 1958, Mr. Darlington stated that he had no evidence to offer in support of his objections, and asked for, and was granted, a period of five days in which to file further specifications and a memorandum in support of his objections. This period has now elapsed, and no supporting me-

orandum or specifications have been filed by counsel for Peckham.

"It appears to the Court that the objections to original plan and to the amended plan which have been filed on behalf of Peckham are based on mere suspicion; have not been supported by any evidence and based wholly upon the unsworn and unsupported statement of counsel for Peckham. The amended plan and the record of these proceedings in no way support Peckham's contentions.

"The objections to the amended plan filed on behalf of Peckham, and the objections filed to the original plan, to the extent that the same are reiterated in the later document, are hereby overruled, and Peckham's motion to dismiss the proceedings is hereby denied."

Peckham took no appeal from the order (accepting the report of the appraisers) entered by the lower court on December 26, 1957 (Record Appendix, A45).

Peckham took no appeal from the order denying his motion to dismiss.

Following the entry of the order of March 21, 1958 (Record Appendix, A74), above quoted, overruling the objections of Peckham to the Amended Plan of Reorganization and denying his motion to dismiss the proceedings, the lower court on April 8, 1958 (Record Appendix, A77), entered its order under section 174 of the Act, approving the Amended Plan for submission to creditors and stockholders, together with its opinion (Record Appendix, A77, A78). On April 10, 1958, a notice of approval of the Plan, with a copy thereof, of the order of approval, a summary of the Plan as approved by the lower court, and a copy of the notice required under section 175 of the Act were served on all persons who might be interested, including R. E. Peckham. The date for a hearing on the confirmation of the Amended Plan was set for May 15, 1958.

The hearing on the confirmation of the Plan was concluded on June 13, 1958, before Judge John W. Delehant. At the hearing on June 13, 1958, Judge Delehant (Record Appendix, A101, A102) announced his intention to overrule the oral objections of Peckham to confirmation, to confirm the Plan, to approve the motion of the trustee for classification of creditors and stockholders, and to approve the mode of consummation of the Plan proposed by Puerto Rico Distilling Company. Counsel for the trustee, Gabriel de la Haba, was charged with the preparation of the orders. The orders in question were signed and entered on June 19, 1958 (Record Appendix, A104, A106, A111).

Peckham appealed (Record Appendix, A103) on June 13, 1958, from the orders which he claims were entered on that date. He filed no subsequent appeals.

The Court of Appeals docketed the appeal from the order of April 8, 1958 (Record Appendix, A77), under No. 5389, and those from the orders purportedly entered on June 13, 1958 (Record Appendix, A112), under No. 5390, and granted a petition for consolidation of the appeals.

## The Peckham Case.

Peckham's sole interest in the proceedings arises from the claims which he has asserted in the case of "R. E. Peckham, Assignee, etc., Plaintiff vs. Ronrico Corporation et al., Defendants; R. E. Peckham, Trustee, etc., Intervenor, vs. Ronrico Corporation et al., Defendants," Civil No. 4639 (hereinafter called the "Peckham Case") in the United States District Court for the District of Puerto Rico. Attached to the document entitled "Claims of R. E. Peckham, as Assignee and Trustee for Creditors" are copies of the original complaint in the Peckham Case and of the intervening claim (Record Appendix, A22, A27).

The burden of the original complaint in the Peckham Case is that Peckham is the assignee of a judgment entered

by an Indiana court against Sol Meyer, the father of Ferd S. Meyer; and also the holder of a judgment on the Indiana judgment entered by the United States District Court for the Southern District of Florida; that Sol Meyer, while insolvent, took assets which should have been applied to the satisfaction of this judgment and with them acquired shares of stock in Florida Cane Products Corporation, causing such shares to be issued in the name of his son, Ferd S. Meyer, in the name of his son's wife, Rosalyn Meyer, in the name of his grandson James Meyer, in the name of himself and Ferd as trustees, in the name of Hoke T. Maroon, in the names of Aaron M. Reder and S. Pierre Robineau, and in the names of David L. Hulsman, W. George Kennedy, Jacob G. Gosch and William C. Chadwick; that the major asset of Florida Cane Products Corporation was the equitable ownership of one-half of the capital stock of Ronrico Corporation; that this equitable ownership of one-half of the capital stock of Ronrico Corporation was transferred to the Ferd S. Meyer Puerto Rican Trust, of which the above-named individuals are the equitable owners, "owning the same pro rata interests in said trust assets as they owned as stockholders in Florida Cane Products Corporation.". The purpose of the action is "to subject the interest of all defendants in said Ferd S. Meyer Puerto Rican Trust and in the assets thereof to the payment of the Plaintiff's said judgments." The prayer of the complaint is that the court subject the several separate interests held by each of said defendants in said trust and in the assets of said trust to the payment of plaintiff's said judgments, and to do all things necessary or proper to that end, including the sale of said interests and the application of the proceeds thereof to plaintiff's judgments.

The burden of the intervening claim is that Peckham is the "trustee holder" of a judgment entered by a Florida court against Ferd S. Meyer (not against any other defendant in the principal case); that Ferd S. Meyer, while in-

solvent, became the owner of a one-half interest in a certain invention and subsequent patent, which he converted into a 30% interest in the Ferd S. Meyer Puerto Rican Trust, and, it is alleged, concealed the same by causing the beneficial interest in the Trust to be issued in the name of Hoke T. Maroon as trustee. The prayer is that this 30% interest in the Ferd S. Meyer Puerto Rican Trust be subjected to the payment of the Florida judgment against Ferd S. Meyer, and that the court do all things proper to effect this purpose, including the sale of such interest and the application of the proceeds thereof to such judgment.

The original complaint, it will be observed, seeks to subject to payment of the Indiana judgment only the interest of the named defendants in the Ferd S. Meyer Puerto Rican Trust; and the intervening claim seeks to subject to the payment of the Florida judgment only a described 30% interest of Ferd S. Meyer in the Ferd S. Meyer Puerto Rican Trust.

As the record shows (Record Appendix, A115), the Ferd S. Meyer Puerto Rican Trust was the holder of common stock of the debtor; it was at no time the holder of preferred stock of the debtor (Record Appendix, A117). The common-stock holding of the Meyer Trust in the debtor corporation was originally 625,000 common shares of a par value of 1 per share, which was on June 21, 1955, reduced to 6250 common shares. One-half of the preferred stock issued by the debtor in 1947 was issued to the individual members of the Meyer Trust, but not to the trust (Record Appendix, A117). The preferred stock did not exist at the time of the filing of the original complaint in the Peckham Case, which was on May 20, 1946; it did exist on March 9, 1949, when the intervening claim was originally filed, but the intervening claim makes no mention of preferred stock. Neither the original complaint nor the intervening claim has ever been amended to assert any claim against any portion of the preferred stock of the debtor corporation.

As a matter of fact, the claim of the original complaint in the Peckham Case is not to a full one-half of the common stock of Ronrico Corporation which was formerly held by the Meyer Trust, but only, as stated in the complaint and in the prayer, to "the several separate interests held by each of said defendants in said trust and in the assets of said trust." Certain other beneficiaries of the Meyer Trust, namely, Harry and Fay Herff, Howard Intermill and R. M. Jones, were not made parties to the Peckham Case (Record Appendix, A119). These beneficiaries hold a beneficial interest in the Meyer Trust of approximately 12.68%, leaving the defendants in the Peckham suit with at most 87.32% of the beneficial interest in the trust, or, stated otherwise, a beneficial ownership of 43.66% of the shares of the common capital stock of the debtor.

It accordingly follows that Peckham, as plaintiff in the Peckham Case, has asserted a claim against not more than 43.66% of the common shares of the debtor; and as intervenor a claim against not more than 30% of the Meyer Trust, or 15% of the common shares of the debtor. It is also submitted that Peckham has at no time asserted any claim against any one or more of the preferred shares of the debtor.

The significance of this conclusion lies in the fact that, as is stated in the order of the District Court overruling Peckham's objections to the Amended Plan (Record Appendix, A74, A75), the District Court determined on the basis of an appraisal by three disinterested appraisers that there is no equity in the debtor for the common stockholders. The equity for the preferred stockholders amounts at most to $52,937.

As a result, it would seem to follow that, insofar as the debtor is concerned, Peckham's contingent lien was, prior to confirmation of the plan of reorganization, attached to an asset of no value.

## Argument.

### Point One.

THE PETITION FOR WRIT OF CERTIORARI STATES NO GROUND UNDER RULE 19 FOR ISSUANCE OF A WRIT OF CERTIORARI.

In Rule 19(b) of its Rules this Court has indicated the character of the reasons which will impel it to issue a writ of certiorari. The petition for writ of certiorari does not state upon which, if any, of the reasons enumerated in Rule 19(b) petitioner relies. From an examination of the petition, however, it would seem that petitioner may contend either that the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court;" or that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

As to the first hypothesis, it has been recognized law since 1936 (*In re Trust No. 2988 of Foreman Trust & Savings Bank* (C.A. 7, 1936), 85 F. 2d 942; cert. den. *sub nom. Tetzke* v. *Trust No. 2988*, 299 U.S. 609, 57 S. Ct. 235, 81 L. Ed. 450) that no one but a party to a suit may appeal, and that under section 77B of the Bankruptcy Act a creditor did not become a party merely because he was heard in the District Court. To become a party under section 77B it was necessary for the creditor to apply for leave to intervene and obtain an order granting him such right.

> *In re Kenmore-Granville Hotel Co.* (C.A. 7, 1937), 92 F. 2d 778; cert. den. *sub nom. Meyer* v. *Kenmore Granville Hotel Co.*, 302 U.S. 767, 58 S. Ct. 481, 82 L. Ed. 596.

This section of 77B (11 U.S.C. 207(c)) was amended by the Chandler Act, and now appears as section 206 of the

Act (11 U.S.C. 606). As is stated in Collier (Collier on Bankruptcy (14th ed.), vol. 6, pp. 2900, 2901):

> "... Section 206, conferring a much broader right to be heard upon the debtor, all creditors, stockholders and indenture trustee, has likewise been interpreted to give to those parties a right to appeal extending, as the section reads, to 'all matters arising in a proceeding.' This marks a variance from ordinary bankruptcy practice, where it is generally held that a creditor may not appeal from an order dealing with another creditor or with matters of the estate not directly affecting his own interest except upon authorization by the court when the bankruptcy trustee fails or refuses to protect the creditors' interests in the situation. It is universally agreed, however, that Congress intended a more extensive right of appeal in Chapter X cases, and section 208, giving the Securities and Exchange Commission under certain conditions the rights of a party in interest but withholding the right to appeal, has been pointed to as indicating legislative awareness that the right to be heard carries with it the right to appeal. ..."

From this it would seem to follow without serious doubt that Congress, in passing the Chandler Act in 1938, was dissatisfied with the rule in the case of *In re Trust No. 2988 of Foreman Trust & Savings Bank, supra*, and, with knowledge of that rule, amended the statute to give creditors and stockholders broader rights of appeal than they had previously enjoyed under section 77B. It would also seem to follow that since, as Collier states, Congress seems to have recognized that the right to be heard carries with it the right to appeal, Congress did not intend to extend the right to appeal to one who could have become, but chose not to, a party by intervention under section 207 of the Act (11 U.S.C. 607).

In any event, the rule has been unquestioned since 1943 that one who can become a party only through intervention under section 207 has no right to appeal if he fails to make application for leave to intervene and fails to obtain an order permitting his intervention.

*In re South State Street Bldg. Corp.* (C.A. 7, 1943), 140 F. 2d 363; cert. den. *sub nom. Hofheimer* v. *Gold* (1944), 322 U.S. 761, 64 S. Ct. 1279, 88 L. Ed. 1588.

Under these circumstances it is submitted that the federal question, if any, has been adequately resolved, without conflict of authority, in accordance with the intent of Congress; and that there is no compelling reason why the question should now be considered by this Court.

From what has been said it would seem equally apparent that the Court of Appeals for the First Circuit did not in this case depart in any way from the accepted and usual course of judicial proceedings. All the Court of Appeals did was to follow what practitioners have believed to be the law since 1936, except as the same was changed by Congressional action in 1938.

## Point Two.

### The Court of Appeals Correctly Dismissed Petitioner's Appeals on the Ground that Petitioner had Failed to Become a Party to the Proceedings in the District Court.

There is no common law of bankruptcy. The power of the Congress to legislate with respect to bankruptcy is derived directly from the Constitution (section 8, clause 4). The sum total of the laws relating to bankruptcy now appear in the Bankruptcy Act (herein called the "Act"),

chapter X of the Act, comprising sections 101-276. In section 206 of the Act Congress has stated in express, unmistakable terms who may, as of right, become a party to a chapter X proceeding, as follows:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

In section 207 Congress recognized that there might be others having an interest in the proceeding, and provided:

> "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given."

In the interest of orderly administration of estates of debtors under chapter X, the right of appeal must of necessity be limited to those persons who are parties as of right under section 206, *supra*, or to those who may have become parties by intervention under section 207.

*In re Central States Electric Corp.* (C.A. 4, 1953), 206 F. 2d 70; cert. den. *sub nom. Henis v. Egan*, 346 U.S. 899, 74 S. Ct. 225, 98 L. Ed. 399.

*In re South State Street Bldg. Corp.* (C.A. 7, 1943), 140 F. 2d 363, 366; cert. den. *sub nom.*

*Hofheimer* v. *Gold* (1944), 322 U.S. 761, 64 S. Ct. 1279, 88 L. Ed. 1588.

Intervention is not a mere formality, but requires a formal determination by the lower court of the matters with respect to which intervention is allowed. If this were not so, creditors and stockholders who are parties of right in a chapter X proceeding will find themselves deprived of their undoubted right to oppose a petition for intervention, and to appeal from an order allowing such an intervention. An illustration of the importance of adhering to the statutory procedure appears in *In re V-I-D, Inc.* (C.A. 7, 1949), 177 F. 2d 234; cert. den. *sub nom. Glover* v. *Coffing*, 339 U.S. 904, 70 S. Ct. 518, 94 L. Ed. 1333. It is significant that, in the *V-I-D* case just cited, the appellant was represented by one Jay E. Darlington, of Hammond, Indiana, who appears to be the same counsel who represented Peckham in the lower courts, and who represents him on this petition for certiorari. If this is correct, it would seem to follow that the same counsel who showed familiarity with the procedure under section 207 of the Act in the *V-I-D* case, *supra*, did not fail to make a proper, timely application to intervene in the District Court in this case, through inexperience, ignorance or oversight. It is fair to conclude that counsel's omission was deliberate, and part of an over-all strategy. It is not immediately apparent what counsel's strategy was, but we do know that counsel's entire attitude in the District Court was in defiance of, rather than in subordination to, the main proceedings in the District Court (Record Appendix, A37).

The two *V-I-D* appeals would seem to cast certain light on the subject. In the 1949 episode (177 F. 2d 234, 236) the Court of Appeals for the Seventh Circuit said:

"The petitioner herein did not in her latest petition in the case come in as an intervenor in subordination

> to the main proceedings but rather in defiance thereto 'To seek to set aside the entire proceedings in a case, and to have the same held for naught on the ground that they are absolutely void cannot be in recognition of the propriety of the main suit.'"

In the 1955 episode in the *V-I-D* case (226 F. 2d 113, 114; cert. den. *sub nom. Kelley, Glover & Vale, Inc.*, v. *Coffing*, 350 U.S. 968, 76 S. Ct. 437, 100 L. Ed. 840; rehearing den. 351 U.S. 915, 76 S. Ct. 693, 100 L. Ed. 1449) the same Court of Appeals said:

> "On September 11, 1953, an amended plan of reorganization was submitted by the court appointed trustee. It is this plan which is now under attack, for reasons which we find difficult to comprehend. The strategy of the appellant, however, appears to rest upon the hope that a reversal will result in a dismissal of the proceeding with the rights of the parties relegated to the State courts, where litigation can be renewed and perhaps continue for another ten years."

It is not unfair to assume that counsel is proceeding on a like basis in this case. By refusing to intervene, Peckham avoids a recognition of the propriety of the main proceedings and thus is free, so he hopes, to make any sort of attack on the validity of the main proceedings, with the eventual hope of obtaining a dismissal leaving him free to renew the litigation in another proceeding.

Petitioner now contends that the Court of Appeals, by dismissing his appeals, has denied him the protection of the Fifth Amendment (Petition, p. 9). More correctly stated, it would seem that, for purposes of his own, petitioner knowingly adopted a course of action which led to a dismissal of his appeals.

## Point Three.

### The Result Reached by the Court of Appeals was Correct on Other Grounds.

*A. Petitioner had no appealable interest in any of the orders from which he purportedly appealed.*

Petitioner's sole aim and interest in the District Court was to dismiss the proceedings. He at no time objected to the Plan originally proposed by the Trustee, or to the Amended Plan which was confirmed by the District Court, as a Plan of Reorganization. His consistent position was that the proceedings should be dismissed. Petitioner's position in the District Court is plainly stated in his objections (Record Appendix, A30) and in the statement of his counsel to the District Court on July 15, 1957 (Record Appendix, A37).

After hearing counsel on Peckham's motion to dismiss, the District Court on March 21, 1958, overruled his objections to the plan of reorganization, and denied his motion to dismiss (Record Appendix, A74). This was the only order entered by the District Judge by which Peckham could conceivably have been aggrieved. No effort was made to take an appeal from that order.

Instead, Peckham purportedly appealed (Record Appendix, A91) from an order entered by the District Court on April 8, 1958, approving the plan of reorganization for submission to the creditors (Record Appendix, A77). Later, on June 13, 1958, he purportedly appealed from the orders which, so he says, were entered on June 13, 1958. Presumably the appeal was meant to be taken from the three orders entered on June 19, 1958, as follows:

(*a*) An order classifying creditors and stockholders (Record Appendix, A104).

(*b*) An order confirming the Plan of Reorganization (Record Appendix, A106).

(c) An order directing that the consummation of the Plan be carried out in a specific manner (Record Appendix, A111).

Peckham, who merely sought to dismiss the whole proceedings, is not aggrieved by these orders, or any of them. As a matter of fact, the beneficiaries whom Peckham purportedly represents are benefited by the confirmation of the Plan of Reorganization. As has been pointed out, Peckham's contingent liens, if any, attach to the worthless common stock of Ronrico Corporation held by some of the beneficiaries of the Meyer Trust. The District Court, by basing the Plan on the Memorandum of April 28, 1958, rather than on the appraisal, has in effect created an equity for the common stock of Ronrico Corporation where none existed before; and Peckham, without asking for it and over his strenuous objection, has received the benefit of this equity.

It is, or ought to be, obvious that, if Peckham should succeed in obtaining a dismissal of the proceedings in the District Court, the beneficiaries for whom Peckham purports to act will lose the benefits of the Plan as approved and confirmed by the District Court, and consequently will lose the benefits conferred upon them by the Memorandum of April 28, 1958. Peckham and the beneficiaries whom he purportedly represents will be back where they were before; namely, claimants of a contingent lien upon approximately 44% of the worthless common stock of an insolvent corporation.

It is a basic principle that one may not appeal from an order who is not aggrieved by that order.

*Ex parte Levitt*, 302 U.S. 633, 58 S. Ct. 2, 82 L. Ed. 493.

*In re Michigan-Ohio Bldg. Corp.* (C.A. 7, 1941), 117 F. 2d 191, 193.

*In re V-I-D, Inc.* (C.A. 7, 1955), 226 F. 2d 113.

In view of the order of the District Court approving the appraisal of the properties of Ronrico Corporation (Record Appendix, A45), from which petitioner did not attempt to appeal, it is apparent that the order approving the Plan of Reorganization and the order confirming the Plan increase, rather than diminish, the petitioner's potential property; decrease, rather than increase, his burdens; and affect his rights beneficially rather than to his detriment. Without these orders petitioner would have nothing over which to continue his litigation; with them he has a contingent lien on some $99,000.

The order classifying creditors and stockholders, and the order directing the manner in which the Plan is to be consummated, can hardly be considered as aggrieving petitioner.

Peckham would seem to be in a position analogous to that of the appellant in the 1955 episode in the *V-I-D* case, *supra* (226 F. 2d 113). There an appeal was taken from the overruling of appellant's objections to the confirmation of an amended plan of reorganization. There, as here, the District Court had earlier held that the fair value of the assets of the debtor was insufficient to cover any portion of the appellant's claim. No appeal was taken from the prior orders, and the court held that they were not subject to review on appeal from the later orders. The appeals were dismissed upon the ground that the appellant had no appealable interest in the orders from which she had appealed.

Peckham's strategy is not unlike that condemned by the Court of Appeals for the Seventh Circuit in the 1955 episode in the *V-I-D* case, *supra*. Peckham made no effort to appeal from the order of May 3, 1957, approving the trustee's report under section 167 of the Act, and thus absolving Puerto Rico Distilling Company from charges of mismanagement. Peckham made no effort to appeal from the order of December 21, 1957, approving the report of the

appraisers and thus establishing that there was no equity in Ronrico Corporation for the common stock upon which Peckham claims a contingent lien. Peckham made no effort to appeal from the order of March 21, 1958, overruling his objections to the Plan of Reorganization, and denying his motion to dismiss the proceedings. As a result, he is bound by these orders, whether or not he became a party to the proceedings in the District Court. He would now like, as in the *V-1-D* case, to obtain a dismissal of the proceedings in the District Court, and thus erase all of these orders from the record, and be free to litigate in another tribunal.

To achieve this result, he not only refrained from intervening in the lower court (thus avoiding a recognition of the propriety of the main suit), but now seeks to appeal from orders which in no way aggrieve him (rather than from those orders in which he might have had a legitimate interest).

As an illustration of the petitioner's strategy, the attention of the Court is called to the charges made on page 5 of the Petition to the effect that the "plan was a perversion of the Chapter X judicial machinery for the purpose of accomplishing a violation of the Anti-Trust laws of the United States and also of Puerto Rico, and a violation of the Internal Revenue laws of the United States; and that the plan was the result of collusion between the Meyer and Puerto Rico Distilling Company stockholders to avoid Petitioner's asserted liens and to accomplish the aforesaid unlawful objects."

These matters were presented to the District Court (Record Appendix, A30, A69), and were resolved by the District Court in its order of March 21, 1958 (Record Appendix, A74, A75, A76), as follows:

> "No evidence has at any time been offered to the Court by Peckham in support of the original objec-

tions, filed on June 11, 1957; and no evidence was offered at the hearing of February 28, 1958 in support of either the old or the new objections. In fact, the new objections do not contemplate the introduction of evidence, but in each paragraph expressly rely upon what appears on the face of the amended plan and in the record of the proceedings.

"At the hearing on February 28, 1958, Mr. Darlington stated that he had no evidence to offer in support of his objections, and asked for, and was granted, a period of five days in which to file further specifications and a memorandum in support of his objections. This period has now elapsed, and no supporting memorandum or specifications have been filed by counsel for Peckham.

"It appears to the Court that the objections to original plan and to the amended plan which have been filed on behalf of Peckham are based on mere suspicion; have not been supported by any evidence and (are) based wholly upon the unsworn and unsupported statement of counsel for Peckham. The amended plan and the record of these proceedings in no way support Peckham's contentions."

Significantly, no appeal was taken from this order, which decided, in the plainest possible language, each and every one of the objections which Peckham had urged to the Plan and to the proceedings themselves.

*B. The appeals are mere collateral attacks upon prior orders of the District Court which are now final and unappealable.*

As has been pointed out, there are in this proceeding at least three basic orders upon which the plan of reorganization is based; namely:

(1) The order of May 3, 1957, approving the report of the trustee under section 167 of the Act (Record Appendix, A17);

(2) The order of December 26, 1957, approving the report of the appraisers (Record Appendix, A45); and

(3) The order of March 21, 1958, overruling Peckham's objections to the Amended Plan of Reorganization, and denying his motion to dismiss the proceedings in the District Court (Record Appendix, A74).

Each of these orders was plainly appealable and, had Peckham made a timely motion for leave to intervene, there is no doubt that he might have appealed from any one, or all, of them. Each of the three orders would seem to have the requisite finality for an appeal. The order of May 3, 1957, was obviously intended to determine, and did determine, that a claim against Puerto Rico Distilling Company was not among the assets of the debtor. The order of December 26, 1957, was obviously intended to determine, and did determine, the going concern value of the debtor, and was in turn based upon the order of May 3, 1957, in that the appraisers did not include, and could not have included, a claim against Puerto Rico Distilling Company as one of the assets of Ronrico Corporation. The order of March 21, 1958, was intended to determine, and did determine, that the District Court was not going to use its discretion and dismiss the proceedings under section 236 of the Act.

Each of the orders was final in the sense that it stated in clear and formal language the last word of the lower court on the particular problem involved; and the parties to the proceedings, as well as Peckham, were on notice that these orders were intended to be basic building blocks in the preparation of a plan of reorganization.

The Court of Appeals for the Seventh Circuit, in *In re Trust No. 2988 of Foreman Trust & Savings Bank*, *supra*, at page 943, states the rule as follows:

> "... An order in bankruptcy proceedings, from which either an absolute or discretionary appeal may

be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. (Citing cases) Otherwise a party might permit the time within which to appeal from an interlocutory order to expire and then by an appeal from a final order, by indirection, achieve a review of something which it was not entitled to review."

In *In re Irving-Austin Building Corp.* (C.A. 7, 1938), 96 F. 2d 905, the same court said, at page 906:

"An order in a bankruptcy proceedings, from which appeal may be had, may be reviewed only upon an appeal from that order and not on an appeal from a subsequent order. Nor may a party refrain from direct attack by motion to modify or by appeal from an order and later collaterally attack the same by an appeal from a later order, in which the court overrules an objection attempting to raise a question disposed of by the previous order. . . . This court cannot, upon appeal from the order of confirmation, review the order of classification previously entered."

*Marcy* v. *Miller* (C.A. 10, 1938), 95 F. 2d 611.
*Matter of Louis Joilet Garage Corp.* (C.A. 7, 1938), 100 F. 2d 751.

*C. An order approving a plan of reorganization under section 174 of the Act is not an appealable order.*

In No. 5389 appellant has purported to appeal from the order entered by the lower court on April 8, 1958, approving a plan of reorganization under section 174 of the Act.

The Act does not contemplate that an order approving a plan under section 174 should in any sense be a final order. Section 180 of the Act expressly provides:

"The order of the judge approving a plan, as provided in section 174 of this Act, shall not affect the

right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan."

While section 24 of the Act grants appellate jurisdiction to the Courts of Appeals in proceedings in bankruptcy, either interlocutory or final, to review, affirm, revise or reverse, both in matters of law and in matters of fact, the appellate courts have wisely refused to review interlocutory orders not having a certain degree of finality. As was stated in *Hoehn* v. *McIntosh* (C.A. 6, 1940), 110 F. 2d 199, 201:

"... Before reviewable, administrative orders must have a certain degree of finality. The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that rights may be definitely determined by review."

*D. The appeals taken on June 13, 1958, were prematurely taken, and the Court of Appeals was without jurisdiction to hear the same.*

The notice of appeal in No. 5390 (Record Appendix, A103) states that the appeals are taken "from the District Court's order entered herein on June 13, 1958, and each of them, including specifically the Order granting the Trustee's petition for classification of creditors, the Order granting Puerto Rico Distilling Company's petition to amend the Amended Plan, and the Order confirming said Plan as thus amended."

The record reveals (Record Appendix, A112) that on June 13, 1958, the District Court in this case entered no

orders of any kind. What occurred is set forth in the transcript of the hearing held on June 13, 1958, and the action taken by the District Judge is succinctly stated by the District Judge himself as follows:

> "To come sharply and briefly to the point of the morning's session, the several objections to the motion for confirmation of the plan of reorganization, and to the Puerto Rico Distilling Company's amended petition for confirmation of the plan, are denied and overruled. The motion for confirmation of the plan and the amended petition for confirmation of the plan are severally granted and allowed; the confirmation (consummation?) and the operation of the plan to take form as outlined in the amended petition for confirmation. *I charge Mr. de la Haba with the preparation of both orders which have been announced.* First, the one sustaining his petition for the classification of creditors and stockholders; secondly the one which I now announce. *He should, of course, submit them to counsel and then submit them for signature.*" (Italics supplied.) (Record Appendix, A101, A102.)

The docket entry (Record Appendix, A112) made by the Clerk following the hearing on June 13, 1958, reads as follows:

> "Case called for hearing on motions pending. Oral mot. of R. E. Peckham to pet. of trustee to classify creditors & stockholders heard & overruled. Said pet. of trustee granted. Argument heard on mot. for confirmation of plan of reorganization & objections thereto. Objections denied & overruled & mot. for confirmation of plan & amended pet. for confirmation of plan granted. Mr. de la Haba directed to prepare orders."

The transcript of the record of the hearing of June 13, 1958, and the subsequent action of the Judge and the Clerk leave no doubt that the Judge of the District Court did not intend the statements made from the bench at the hearing on June 13, 1958, to be his final act on the question of confirmation of the Plan, classification of creditors and stockholders, or on the amended petition of Puerto Rico Distilling Company for confirmation. Counsel for petitioner could not reasonably have been misled or confused by the situation. He was present in the District Court. He obviously heard the statements made by the District Judge, since, immediately after the lower court's statement, counsel stated:

> ". . . Now, it will be my purpose to file, probably today, a notice of appeal from the order just entered confirming the plan . . ." (Record Appendix, A101, A102.)

The orders which the District Judge referred to were in fact entered on June 19, 1958. The docket entries for June 13 and June 19, 1958, are copied in full in the Record Appendix, pages A112, A113.

The result is that Peckham failed entirely to invoke the jurisdiction of the Court of Appeals by the document which he filed on June 13, 1958 (Record Appendix, A103).

The jurisdiction of a Court of Appeals in matters of bankruptcy is wholly statutory, and must be found, if at all, in the provisions of section 24 of the Bankruptcy Act. The manner of invoking this jurisdiction is set out in section 25 of the Act. This latter section provides:

> "Appeals under this Act to the United States Courts of appeals *shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment*, order or decree complained of, proof of which notice shall be filed within five days after service

or; if such notice be not served and filed, then within forty days from such entry." (Italics supplied.)

Bankruptcy General Orders Nos. 36 and 37 make the Federal Rules of Civil Procedure generally applicable to bankruptcy practice.

Specifically, General Order 37 provides that "in proceedings under the Act the Rules of Civil Procedure for the District Court of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

It would thus seem that we may properly turn to the Rules of Civil Procedure for an indication of the meaning of the phrase "entry of judgment" as used in section 25 of the Bankruptcy Act. In Rule 58 we find the following:

> "When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, *the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk.* The notation of a judgment in the civil docket as provided in Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry." (Italics supplied.)

The meaning of the phrase "entry of judgment" has been recently explored in the case of *United States* v. *F. & M. Schaefer Brewing Co.* (1958), 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 721, in which this Court stated, at page 232:

> "While an opinion may embody a *final decision*, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion. Therefore, when, as here, the action is for money only—whether for a liquidated

or an unliquidated amount, as Rule 58 makes no such distinction—it is necessary to determine whether the language of the opinion embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case. If it does so, it constitutes his final judgment and, under Rule 58, it 'directs that a party recover [a sum of] money,' and, 'upon receipt by [the clerk] of the [opinion],' requires him to 'enter judgment forthwith' against the party found liable for the amount awarded, which is to be done by making a brief 'notation of [the] judgment in the civil docket [showing the substance of the judgment of the court] as provided by Rule 79(a).' When all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run under the provisions of Rule 73(a)."

This would seem to concur with the analysis made by the Court of Appeals for the First Circuit in *In re Forstner Chain Corp.* (C.A. 1, 1949), 177 F. 2d 572, 576.

Unlike the situation in the *Schaefer* case, *supra*, the entire record need not be examined to determine the intention of the District Judge. There can be no doubt that the District Judge intended, as is in fact required by the second clause in Rule 58, to enter a formal order. He said: "I charge Mr. de la Haba with the preparation of both orders which have been announced. . . . He should, of course, submit them to counsel and then submit them for signature." It is difficult to conceive of clearer language.

The Judge of a District Court clearly has this power. As Mr. Justice Frankfurter says in the *Schaefer* case (at pages 241-242):

"Of course the court may, in the exercise of its control over the shape of the judgment and the time of

its rendition, indicate that no judgment will be rendered until a formal document is drawn up, approved, and signed. The Rules themselves recognize that in many cases, according to the relief awarded, the careful formulation of a separate judgment may be indispensable to the proper disposition of the litigation. Moreover, a formal document evidencing the judgment may in some circumstances be necessary for execution, for registration under state law, for divers purposes unrelated to the taking of an appeal."

The quoted language used by the District Judge can only mean that the District Judge intended to exercise the control to which Mr. Justice Frankfurter refers.

A premature appeal does not invoke the jurisdiction of the appellate court.

In *United States* v. *Crescent Amusement Co.* (1944), 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160, this Court held that a premature appeal was a nullity, and granted a motion to dismiss.

In *Wright* v. *Gibson* (C.A. 9, 1942), 128 F. 2d 865, 866, appeal was taken from an opinion concluding with the words: "the motion . . . is granted." In dismissing the appeal the court said:

"Actually, no order dismissing the second count was ever entered. Indeed, so far as the record shows, no order, judgment or decree of any kind was ever entered in this case. The opinion was not an order, judgment or decree. Its filing, therefore, did not constitute the entry of an order, judgment or decree, nor did the clerk's statement that 'said motions are granted' constitute such an entry. Thus at the time the notice was filed, there was nothing from which an appeal could be taken."

In *Stevens v. Turner* (C.A. 7, 1955), 222 F. 2d 352, 354, an appeal was taken from a summary judgment for support and maintenance. At the time the appeal was taken there was pending a motion of the judgment debtor to amend the judgment by reducing the total amount of the recovery. Of significance for the instant case is the fact that in the *Stevens* case the motion to amend the judgment was overruled by the trial court after the appeal was taken. In granting a motion to dismiss the appeal the court said:

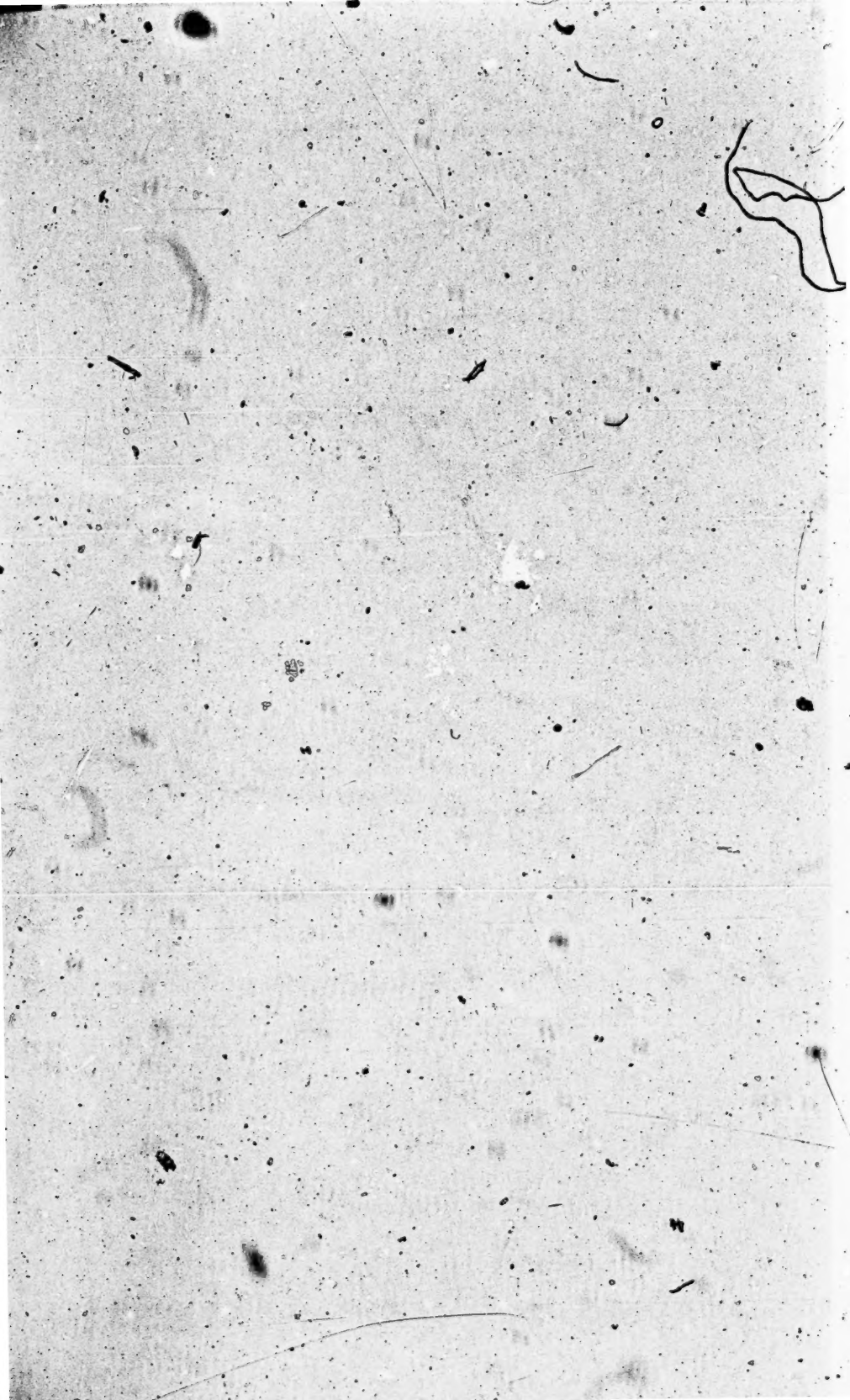
"It follows, we think, that defendant's appeal, taken while his motion to amend the judgment was pending, was premature. We acquired no jurisdiction by virtue of it and no after-occurring action or event can inject vitality into it. United States v. Crescent Amusement Co., 323 US 173, 177, 65 S Ct 254, 89 L ed 160; R.F.C. v. Mouat, 9 Cir., 184 F 2d 44. The factual situations involved in the cases last cited and in Studer v. Moore, 2 Cir. 153 F 2d 902, are essentially identical with that before us. In each, a substantive motion intervened between the entry of judgment and the taking of the appeal. In each the motion was thereafter disposed of prior to the appellate tribunal's consideration of the jurisdictional question. In each a judgment of dismissal was entered. The Court of Appeals for the Second Circuit aptly observed, in Studer v. Moore, 153 F 2d at page 903, 'Although it must be owned that the defect is purely formal, it concerns our jurisdiction, and, in spite of our first impression to the contrary, we see no escape from holding that, since the original appeal did not remove the cause, nothing done thereafter in the District Court (could cure the defect).'"

## Conclusion.

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.

HAROLD A. SEGALL,
52 Wall Street,
New York 5, New York,
Attorney for Appellees.

Of Counsel:
HERBERT S. MCCONNELL,
P.O. Box 4224,
San Juan 21,
Puerto Rico.



FILED
MAY 1 1959
JAMES R. BROWNING, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1958**

---

## No. 716

---

R. E. PECKHAM, Assignee and Trustee,
*Petitioner,*

*vs.*

JOSE E. CASALDUC, Trustee of Ronrico Corporation in Reorganization, et al.,
*Respondents*

---

## PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

**to the United States Court of Appeals for the First Circuit.**

---

Jay E. Darlington,
*306 Hammond Building,*
*Hammond, Indiana;*
*Attorney for Petitioner.*

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1958**

---

## No. 716

---

R. E. PECKHAM, ASSIGNEE AND TRUSTEE,
*Petitioner*,

*vs.*

JOSE E. CASALDUC, TRUSTEE OF RONRICO CORPORATION IN REORGANIZATION, ET AL.,
*Respondents*

---

## PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

**to the United States Court of Appeals for the First Circuit.**

---

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The above named Petitioner respectfully petitions that this Court may reconsider and grant his Petition for Writ of Certiorari herein, and shows:

### *The Factual Background*

On April 6, 1959, this Court entered an order, without further explanation, denying his Petition for Writ of Certiorari. This Petition for Rehearing thereof is filed on the 25th day thereafter.

The factual situation is simple:

The United States District Court for Puerto Rico entered orders approving and confirming a Chapter X reorganization plan for *Ronrico Corporation*, a long-time important factor in the rum producing and distributing business of Puerto Rico and of the United States.

Petitioner, in the role of an asserted $2,000,000 equitable lien holder upon the capital stock of said Ronrico Corporation, who thereby had a *property right* in the stock, appealed from said approving and confirming orders to the United States Court of Appeals for the First Circuit, complaining in his appeal that:

The amended plan substituted $244,000 of *cash* in place of the *stock* which was subject to his lien and was allegedly worth $1,000,000. The amended plan thereby reduced the *subject matter* of his lien by $750,000 and prejudiced his *property* rights in the stock.

The District Court, by orders and opinion, overruled *on the merits* the aforesaid objections which petitioner filed to the amended plan.

Petitioner appealed therefrom to the Court of Appeals. He was the only appellant. The other parties in the District Court allegedly were in *collusion* to promote the amended plan.

One of the appellees-respondents, Puerto Rico Distilling Company, filed a motion in the Court of Appeals to *dismiss* the appeal on the ground that this appellant-petitioner "*had no right to be heard*" on appeal,—though the District Court had heard his objections on the *merits* and had entered an order and opinion against him on the merits. (Petition for certiorari, pp. 9, 4a-12a).

The Court of Appeals *dismissed* the appeal on this

ground. (Opinion, appended to Petition for Writ of Certiorari, pp. 14a-16a).

From this dismissal of his appeal, the appellant-petitioner filed his Petition for Writ of Certiorari,—seeking not this Court's review of the merits of his appeal, but its writ of certiorari to require the Court of Appeals to entertain and decide the merits of his appeal. (Petition for Certiorari, p. 2).

**Questions Not Previously Presented.**

Petitioner respectfully urges that the following grounds are of controlling importance and sufficient to warrant certiorari, *in addition* to grounds I and II of the Petition for Writ of Certiorari (pp. 9-10):

**III.**

*Certiorari is more freely granted,* and should be granted here, to require a Court of Appeals to exercise its appellate jurisdiction to review the merits of an appeal which it has erroneously refused to exercise.

*Reason for petitioner's previous failure to present this ground:* The Petition for Writ of Certiorari *assumed* the above underlying premise without expressly stating it (pp. 9-10), because:

(1) Petitioner believed the Court would judicially notice the proposition. But he now believes that the Court may have overlooked its full import, and may have viewed this case as just another routine Chapter X reorganization appeal.

(2) A further cause of petitioner's failure to specify this proposition was that he was compelled to prepare the petition under much pressure for time,—trying a jury case by day and preparing the petition by night.

## IV.

Petitioner seeks *appellate review of his charge* that the so-called "Amended Plan of Reorganization" of Ronrico Corporation, approved and confirmed by the United States District Court for Puerto Rico, was not only illegal but was illegal for an extraordinary and serious reason:

**It was designed and operates as one essential part of a scheme by the Canadian parent corporation, Distillers-Seagrams Ltd., and its American subsidiaries, to monopolize the rum producing and distributing business in violation of the anti-monopoly laws of both Puerto Rico and the United States.**

Petition for Writ of Certiorari, p. 5 top.
"Appellees' Record Appendix," pp. A69 to A73.

Therefore, there is *inherent* in this case a situation of *governmental and public importance* in addition to, and exceeding, the private rights of the petitioner.

Unless reviewed and remedied by the Court of Appeals, the District Court's approval and confirmation of this amended plan **will stand as a judicial sanction of this alleged monopolistic scheme and its consummation.**

This not only prejudices and destroys petitioner's property rights which he seeks to protect by the appeal, but it may prejudice in several ways the existing and future rights and remedies of governmental agencies against this essential part of this monopoly. It should be remembered that by the terms of Chapter X, the Government is not an idle bystander as in ordinary litigation, but is a potentially interested party. Several of its agencies (Securities and Exchange Commission, Treasurer of United States, and perhaps others) were required to and did receive notice of

the commencement of the proceeding, the proposed amended plan and the hearings on its approval and confirmation.

It presently is unnecessary to determine whether, and to what extent the governmental agencies are precluded or prejudiced by the aforesaid order of the District Court *ratifying* the aforesaid monopolistic scheme, and the Court of Appeals' indirect ratification thereof by its order dismissing petitioner's appeal therefrom.

It suffices presently for this Court to see that Court of Appeals probably has erroneously refused to exercise its appellate jurisdiction on a matter which not only prejudices the petitioner's private property rights, but which also may preclude or prejudice the rights and remedies of the Department of Justice's Anti-Trust Division relative to the charges by the appellant involved in his appeal to the Court of Appeals and in his Petition for Writ of Certiorari herein.

*Reason for petitioner's previous failure to present this ground:* This ground was set forth in petitioner's objections to the amended plan in the District Court, and in his appeal to the Court of Appeals, and in his "Statement of the Case" in his Petition for Writ of Certiorari in this Court. (p. 5 top). Likewise, it was covered from an abstract legal standpoint in the argument of his Petition. (p. 21). Failure to specify it in more detail as a ground was caused by the same reasons set forth under III, supra.

WHEREFORE, for each of the aforesaid reasons, the Petitioner respectfully prays that the Court may rehear and reconsider his Petition for Writ of Certiorari herein, and may thereupon grant said Petition; and he prays for all further just and proper relief herein.

JAY E. DARLINGTON,
*Attorney for Petitioner.*

I certify that the foregoing Petition for Rehearing is filed in good faith, and not for delay, for the purpose of presenting additional grounds believed by me to warrant the granting of the preceding Petition for Writ of Certiorari herein, then available to the petitioner but not presented in said Petition, for the reasons above herein set forth.

JAY E. DARLINGTON,
*Attorney for Petitioner.*

(5476-7)